TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 3[illegible]/55

THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS, THE MEMPHIS GAYOSO GAS COMPANY, AND THE MEMPHIS GAS LIGHT COMPANY, APPELLANTS,

vs.

THOMPSON DEAN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED DECEMBER 2, 1857.

SUPREME COURT OF THE UNITED STATES.

No. 306.

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1 THOMPSON DEAN
vs.
THE MAYOR AND ALDERMEN OF THE CITY of Memphis, The Memphis Gayoso Gas Company, and The Memphis Gaslight Company.

Appeal from the U. S. Circuit Court for the District of West Tennessee.

Filed the 18th day of September, A. D. 1867.

[Bulletin Print.]

UNITED STATES OF AMERICA,

Be it remembered that the Circuit Court of the United States for the district of West Tennessee, was begun and held at the Federal court-room, in the city of Memphis, in said district, on the first Monday, it being the second day of September, in the year of our Lord one thousand eight hundred and sixty-seven. Present and presiding, the Honorable Connally F. Trigg, United States District Judge for the district of Tennessee; present also, Abram S. Mitchell, clerk.

To the judges of the Circuit Court of the United States for the district of West Tennessee:

Thompson Dean, of Westchester County, and a citizen of the State of New York, brings this his bill against the board of mayor and aldermen of the city of Memphis, a municipal corporation in the State of Tennessee, and against the Memphis Gayoso Gas Company, a corporation chartered by an act of the general assembly of Tennessee, and against the Memphis Gaslight Company, another corporation chartered by an act of the general assembly of Tennessee.

And thereupon your orator complains and says that he is a stockholder in the Memphis Gaslight Company, a corporation here-
2 inafter in this bill more specifically complained of. And he is the owner of a large number of shares of stock in said company, and greatly interested in its welfare and will be greatly damaged by any wrong or injury done to said company. And complainant represents to your honors that by an act of the general assembly of the State of Tennessee, passed November twenty-first, 1849, the Nashville Gaslight Company, was duly incorporated with the powers and privileges as follows, to wit:

* * * * *

Section 2. "The business of said company shall be to establish and construct gasworks in the city of Nashville, and they may purchase and hold as much real estate as may be necessary and expedient for said business, and to secure any debts that may be due them."

3. "It shall be the duty of said company to establish, within three years from the first of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gaslights as may be required."

4. "To enable said company to establish such works, they are hereby authorized and empowered to lay down pipes and extend conductors and other apparatus, through all or any of the streets, lanes, or alleys of the city of Nashville."

5. "The said company shall have the privilege of erecting, establishing and constructing gasworks, and manufacturing and vending gas in the city of Nashville, by means of public works for the term of fifty years. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in the other southwestern cities, and for public lights such sums as may be agreed upon by the company and the public authorities of Nashville.

Complainant further shows that at the same session of the general assembly, to wit: on the twenty-first of December, 1849, an act was passed incorporating the Memphis Gaslight Company, and W. B. Miller, R. C. Brinkley, and others, were appointed commissioners to open books of subscription, for the stock of said company, which by the said act was clothed with all the powers, privileges, and immunities contained in the act establishing the Nashville Gaslight Company, except among other things that the word "Memphis" was substituted for the word "Nashville," where the same occurred in said act.

And subsequently, to wit: on the twentieth of November, 1851, the general assembly passed an act renewing the incorporation of the said "Memphis Gaslight Company," extending the time for its existence to ninety-nine years, and granting to it all the rights, privileges, and powers, and imposing upon it the restrictions contained in the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 11th, and 12th sections of the act incorporating the Nashville Gaslight Company, passed November twenty-first, 1849, not inconsistant with the first section of this act. And W. B. Miller, R. C. Brinkley, and others, were appointed commissioners to open books of subscription, after giving notice of the time and place in the different newspapers in Memphis.

3. Complainant further shows that the Memphis Gaslight Company, accepted the said charter, as altered by the act of 1851, and duly organized thereunder, and within three years from the first of January, 1850, established a gas manufactory within the city of Memphis, of sufficient capacity to supply the corporate authorities and inhabitants with such public and private gaslights as might be required; and laid down its pipes and extended its conductors and other apparatus along the streets, alleys, lanes and squares of said city, and manufactured and sold gas to the public authorities and inhabitants in conformity with the provisions of its charter.

Complainant further shows, that thereafter, at its session held in

1858, the general assembly ratifying all the corporate acts of said company, authorized it to increase its capital stock to three hundred thousand dollars, with the same powers, privileges, and restrictions as those previously granted and imposed.

Complainant further shows, that on the eighteenth of March, 1852, in conformity with the obligations of its charter, it entered into a contract with the mayor and aldermen of Memphis, by which they conferred upon the said company the exclusive privilege for twenty years, and until thereafter notified to the contrary, of lighting the city of Memphis with such public lamps as might be agreed upon between the parties, and also the right to lay down its pipes, and extend its conductors and other apparatus through all or any of the streets, alleys, lanes, or squares, according to the established grade of the same, and to exercise all the rights granted by its charter, without any other charge or tax, by the corporate authorities of Memphis, than upon the estimated value of their house and lot, and one hundred dollars per annum.

And in consideration of all the privileges in said contract granted, the company agreed to furnish the city of Memphis, for the use of its public lamps, gas at one-half the price which they charge their private consumers.

Complainant further shows to your honors, that by an act passed of its session of 1866, the general assembly again ratified the corporate acts of said company, and authorized it to increase its capital stock to nine hundred thousand dollars, with the same rights, powers, privileges, and restrictions, as in the original charter.

Complainant further shows, that on the twenty-third of May, 1866, the general assembly passed an act incorporating the Edgefield Gaslight Company. By the third section of the said act the said company is authorized to erect gas works at such places on the north side of Cumberland river, in Davidson County, as they may select, and extend their gaslight and pipes to any place or places in Davidson County, north of the Cumberland river. And on the same day it was enacted, that John Donovan, G. P. Ware, Charles Kortrecht, J. L. Saffarauns, P. P. Higgins, John C. Creighton, and M. D. L. Stewart, are hereby incorporated under the name and style of the "Memphis Gayoso Gas Company," with all the rights, powers, and privileges conferred upon the Edgefield Gaslight Company. And complainant charges that no other rights or privileges whatever were conferred upon the defendant, the Memphis Gayoso Gas Company, except as are hereinabove set forth.

4 Complainant shows to your honors, that the Memphis Gaslight Company, after its organization and after the contract made with the city, as hereinbefore stated, did purchase a valuable real estate, and did construct thereon a manufactory of gas of sufficient capacity to furnish the public authorities and all the inhabitants of Memphis with gas for light, public and private, and has laid down pipes upon many of the streets, lanes, alleys, and squares of the city, and extended its conductors and other apparatus, and has from time to time, at heavy cost and outlay, enlarged its works; and has

for many years, and does now keep them in such condition as to fulfill all the obligations towards the city and the inhabitants imposed by its charter and its contract with the corporate authorities of Memphis.

Complainant further shows, that the defendant, the Memphis Gayoso Gas Company has organized under the charter granted to it by the general assembly, and has established an office in the city of Memphis, and claims by virtue of its act of incorporation to construct public works for the manufacture of gas in the city of Memphis, and the right to lay down its pipes and extend its conductors and other apparatus upon the streets, lanes, alleys, and squares of said city, and is actually engaged in so doing. And in so doing the said defendant has laid its service pipes across both the mains and service pipes of the Memphis Gaslight Company at very many points. And to enable it to do so, has dug and continues to dig, and displaced the soil in an about, both above and below the pipes, conductors and other apparatus of the said Memphis Gaslight Company, and is claiming the right to manufacture gas by public works and sell the same to the inhabitants of Memphis, in competition with the said Memphis Gaslight Company.

Complainant further shows, that the other defendant, the board of mayor and aldermen of the city of Memphis, at a late meeting held on September seventeenth, 1867, passed an ordinance, in substance as follows, on its first reading, to wit: "That the mayor be authorized to hold an election on the day of 186 , to test the sense of the qualified voters of Memphis on the propriety of subscribing two hundred and fifty thousand dollars ($250,000) to the Memphis Gayoso Gas Company, one of the defendants hereto. And complainant apprehends that the influence of the corporate authorities will be exercised upon the voters of the city, very few of whom comparatively are purchasers of gas, favorably to the said project, and that the said authorities will proceed to subscribe to the stock of the Memphis Gayoso Gas Company, and issue the bonds as contemplated in the said ordinance, and thus the defendants will consummate a great wrong to the complainant, to the great injury of the franchise of the Memphis Gaslight Company.

Complainant is advised and insists, that the defendant, the Memphis Gayoso Gas Company has no power or right, under the act of its incorporation, to do the acts complained of. That there is no authority expressed or implied therein, or any power, right, or privilege other than is conferred on the Edgefield Gaslight Company. And that the other defendant, the board of mayor and aldermen of the city of Memphis, have no power or right to subscribe to stock in said company, or to order the election, or issue the bonds contemplated in the said ordinance.

And complainant is further advised that the defendant the board of mayor and aldermen will not be allowed to make the said subscription because, by the contract between it and the Memphis Gaslight Company in consideration of the exclusive privilege, heretofore referred to, the said company undertook to furnish to the corporate author-

ities, gas for the public lights at one half the price charged for the private consumers. And if the corporate authorities are permitted to combine with the other defendants in establishing a competition to furnish the inhabitants by means of public works in competition with the Memphis Gaslight Company, it will be fraud upon that company, which will not be permitted in this honorable court.

And complainant is further advised and insists that the general assembly of Tennessee, having ratified the corporate acts of the said Memphis Gaslight Company, after the said contract was entered into, has adopted the terms thereof, and is restrained by the Constitution of the United States, from any acts of legislation impairing the obligation thereof. And whether such ratification were made or no, the obligation of said contract is binding upon the parties, which the legislature cannot impair.

Complainant is further advised and insists that by the true construction of section third of the act incorporating the Nashville Gaslight Company, and which was afterward made part of the act of incorporation of the Memphis Gaslight Company as is hereinbefore recited, the general assembly granted to the Memphis Gaslight Company, the exclusive privilege of supplying the corporate authorities and inhabitants with such public and private gaslights as might be required, which grant the general assembly cannot constitutionally revoke.

Complainant further shows to your honors, that the city of Memphis is the actual owner of the soil in fee simple of very many of the streets, alleys and lanes within its borders by deeds of conveyance, properly executed for that purpose. And the other streets, etc., have been dedicated to the public use, by the original proprietors thereof. And complainant is advised and so insists, that by virtue of its charter, as also by virtue of its contract with the corporate authorities, under which it obtained the actual use and occupation of the soil of the streets for the laying down of its pipes, and the extension of its conductors and other apparatus, the Memphis Gaslight Company has established an easement therein, and a right and property in the same, which cannot be taken from it for any other private use, or for any public purpose, without making to it compensation therefor.

And complainant alleges that there is no provisions in the charter of the Memphis Gayoso Company for any such compensation, nor has the said defendant any purpose to make the same.

And complainant is advised and so insists, that the board of mayor and aldermen have no authority under the constitution of Tennessee or any law thereof, or any provision in the charter of the city, to make the subscription of stock contemplated, or to issue the bonds proposed therefor. And any law passed since the contract with the city, hereinbefore recited by the Memphis Gaslight Company, to enable the board of mayor and aldermen to issue said bonds, would be a violation of the constitutional rights of said company.

6

But if complainant should be mistaken in the foregoing allegations, he nevertheless charges, that the Memphis Gaslight Company, has

laid down its pipes on the several streets, etc., and service pipes therefrom for the supply of private dwellings within the city, and that the said pipes have been laid and conductors extended from time to time, according to the established grade of the streets, etc., and their pipes, etc., have been constructed to meet the wants of the public and the inhabitants. And complainant alleges that it is necessary repeatedly to change the location of the said pipes, etc., to suit the the changes of grade of said streets, and to enlarge their size, so as to meet the increasing demands of the inhabitants, and complainant alleges that the defendant, the Memphis Gayoso Company, has laid its pipes above those of the Memphis Gaslight Company, and so contiguous thereto, that the said company cannot change the same to suit any new grade of the street, which may be established, nor can the said company enlarge or alter their said pipes as the necessity for so doing may occur. And the said company would be greatly damaged and injured, and would be wholly deprived of its rights and privileges in the premises, if the said defendant, the Memphis Gayoso Gas Company, shall be allowed to go on and lay its pipes above those of the said Memplis Gaslight Company.

And complainant further shows to your honors that he has applied to the president and directors of the Memphis Gaslight Company, of which he is a stockholder and in which he is perhaps the largest stockholder, and urged upon them to proceed in the courts against the corporate authorities of Memphis and also against the said Memphis Gayoso Gas Company, which they decline to do, alleging that they have already filed a bill in the Court of Chancery of Memphis against the last mentioned corporation, and have obtained a partial injunction, and they do not see fit to proceed further in the premises. Whereby and by such refusal your orator is wholly deprived of and denied the aid of said corporation of which he is a member, in maintaining the rights and privileges which in this bill he claims the company is entitled to, and is in jeopardy of losing the value of his stock, and his legal rights in the franchise and the material benefit thereof.

To the end therefore, that the said defendants may answer fully and fairly the allegations of this bill and especially—

1. Whether the Nashville Gaslight Company was not so incorporated?

2. Whether the Memphis Gayoso Gaslight Company was not so incorporated?

3. Whether the Memphis Gaslight Company was not so incorporated?

4. Whether the Memphis Gayoso Gas Company doth not set up the claims, and is not laying its pipes, etc., as alleged in the bill.

5. Whether the board of mayor and aldermen of Memphis did not make the contract with the Memphis Gaslight Company as is alleged in the bill.

6. Whether the said company has not laid its pipes and constructed its works and sold gas as alleged?

7. Whether the city of Memphis or board of mayor and aldermen is not the owner in fee of many of the streets on which the pipes of

the Memphis Gaslight Company are laid, and on which the defendant, the Memphis Gayoso Gas Company, is laying its pipes?

And whether the board of mayor and aldermen has not passed the ordinance in the bill complained of, and that defendants may generally and specifically answer all the matters and things inquired of in the bill, and that the said board may be enjoined from holding the election intended, or from subscribing to the stock of the Memphis Gayoso Gas Company, or issuing bonds therefor, and that the said company may be enjoined from using the streets of Memphis, or laying their pipes therein, or from constructing public works for the manufactory of gas, or from selling the same by means of public works to the inhabitants of Memphis.

And especially that said defendant may be enjoined from crossing the lines of the pipes of the Memphis Gaslight Company, or from laying its pipes above or below theirs, or in anywise to injure or disturb the works of the said Memphis Gaslight Company.

And that the said company may be decreed to have the exclusive privilege in the premises, and for such other and further relief as to your honors may seem just and equitable in the premises.

(Signed) THOMPSON DEAN,
By WM. H. FITCH, JR.,
Attorney.
McRAE & HUMES,
Counsellors for Plaintiff.

STATE OF TENNESSEE,
District of West Tennessee, City of Memphis:

Before me, Fearn Penn, United States Commissioner for the district of West Tennessee, duly appointed under and according to the laws of the United States, with power to administer oaths, etc., personally appeared Thompson Dean, by his attorney in fact, Wm. H. Fitch, jr., to me personally known to be of lawful age, etc., who being by me duly sworn, says, that the statements contained in the foregoing bill, of his own knowledge are true, and those upon the information of others he believes to be true, and signed the same in my presence.

In testimony whereof, I have hereunto set my hand and official seal, this eighteenth day of September, A. D. 1867.

[L. S.] FEARN PENN,
United States Commissioner.

Know all persons by these presents, that I, Thompson Dean, of the city of Cincinnati, State of Ohio, have this day appointed and constituted, and by these presents do appoint and constitute Wm.
8 H. Fitch, jr., of the city of Memphis, State of Tennessee, my lawful attorney for the transaction of any business I have or may have there or thereabouts, for the purpose of collecting moneys due me or for the protection of my interests and investments, shall give receipts in my name, and if necessary for me, and in my name, may and shall enter suits at law, to protect or recover, and in fine, to do and perform all and singular such acts in the premises, as I

might do if personally present, hereby confirming the acts of my said attorney, by virtue hereof.

Witness my hand this thirty-first day of August, A. D. 1867.

(Signed) T. DEAN.

Witness:

(Signed) J. WILSON JOHNSON.

" BEN. M. MINELUS.

[50-cent stamp.]

STATE OF OHIO, *County of Hamilton :*

Before me, a notary public within and for said county, personally appeared Thompson Dean, and acknowledged the foregoing instrument to be his act and deed, for the uses and purposes therein mentioned.

Witness my hand and notarial seal, this thirty-first day of August, A. D. 1867.

(Signed) J. WILSON JOHNSON,
Notary Public, Hamilton Co., Ohio.

STATE OF TENNESSEE,
District of West Tennessee, City of Memphis :

J. Fearn Penn, United States Commissioner for the district of West Tennessee, duly appointed under and according to the laws of the United States, do hereby certify that the foregoing is a true and correct copy of T. Dean's letter of attorney to Wm. H. Fitch, jr.

Witness my hand and official seal, this eighteenth day of September, A. D. 1867.

[L. S.] (Signed) FEARN PENN,
United States Commissioner.

This contract and agreement, made and entered into this eighteenth day of March, 1852, by and between the mayor and aldermen of the city of Memphis, of the one part, and the Memphis Gaslight Company of the other part, witnesseth:

The mayor and aldermen of Memphis, for the purpose of encouraging the construction of gasworks to light the city of Memphis, and for the consideration hereinafter expressed, hereby grant to
9 the Memphis Gaslight Company, a corporation which has just been organized, the following privilege:

1. They shall have and exercise the exclusive privilege for twenty years of lighting the city of Memphis, with such public lamps as may be agreed upon between the said corporation and the city authorities of Memphis, with gas or any other new invention which may hereafter be discovered or devised for the purpose of lighting a city, within the corporate limits of Memphis as at present laid off, or such district as may hereafter be added to the city of Memphis; provided, the said Gaslight Company shall avail themselves of any new invention or improvement which may hereafter be devised or discovered in the manufactory of gas, which shall come into use in other

southern cities, by which supplying the city with gaslight shall be cheapened. The said Gaslight Company agree to furnish the city of Memphis with gaslights, at corresponding reduced rates, and if the said Gaslight Company shall avail themselves of any other invention which may be discovered for lighting the city, and lights become cheapened thereby, then the said company will furnish the city at corresponding rates; and provided, that if the city of Memphis, should determine to discontinue the use of said gaslights at the expiration of twenty years or at any time thereafter, the said city shall give the said company one year's notice of such intention in writing.

2. The mayor and aldermen of Memphis, to enable said company to establish such works, hereby grant to said company now and hereafter authority to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes, alleys, squares, according to the established grade of the same, or other public places in the city of Memphis, in such manner as to produce the least inconvenience to the city or its inhabitants, and to take up if necessary the pavements and sidewalks; provided, they shall at their own expense, repair the same streets and pavements without unnecessary delay.

3. If any person or persons shall injure or destroy any portion of the gas fixtures or other property belonging to said company, or shall willingly open a communication into the street or other gas pipes, or let on gas after it has been stopped by the company, or shall in any manner or shape whatever, injure or otherwise damage the said works and fixtures of said company, in addition to the remedy afforded said company by the seventh section of the act incorporating said company, the mayor and aldermen of Memphis agree by all suitable ordinances within the limits of their power, to protect said company in the enjoyment of their chartered rights, and to punish by fine and otherwise all infractions on their rights.

4. Said Memphis Gaslight Company shall have and exercise all the rights and immunities granted them by the charter, incorporating the same, within the limits of the city of Memphis, without any other charge or tax by the corporate authorities of Memphis, than upon the estimated value of their house and lot and one hundred dollars per annum. Still further to encourage said Gaslight Company, the mayor and aldermen of Memphis, agree to take fifty public lamps to begin with, to be extended hereafter as the public wants and increase of the city may demand, and such as may be agreed upon by the said company, and the mayor and aldermen of Memphis.

5. In consideration of said several grants, concessions and privileges, the Memphis Gaslight Company agree and bind the company to furnish the city of Memphis, for the use of their public lamps, gas at one-half the price which they charge private consumers.

6. It is expressly understood and agreed upon, between the mayor and aldermen of Memphis and the Memphis Gaslight Company, that said company shall only be required to furnish gas for public lamps along the line of mains.

7. It is also understood and agreed upon between the contracting parties, that the corporate authorities of Memphis are always to furnish at their own expense their own lamp posts, and lamps and other fixtures, and to keep the same in repair.

The committee to whom was referred the contract with the Memphis Gaslight Company, after several meetings with a committee on the part of the Gaslight Company, have agreed to the within contract, and recommend its adoption by the board of mayor and aldermen.

Signed by the committee of aldermen.

S. W. JEFFERSON.
SAM. P. WALKER.
A. WOODRUFF.
Committee on behalf of the Memphis Gaslight Company.

WM. RUFFIN, *President Gas Co.*
JAMES M. WILLIAMSON, *Director.*
T. S. AYRES, *Director.*

The foregoing contract was confirmed by the board of aldermen of the city of Memphis, on the eighteenth day of March, 1852, and approved by the mayor.

(Signed) SAM. P. WALKER,
Mayor pro tem.

WILLIAM HOUSTON, *Recorder.*

Exhibit "A" to complainant's bill.

MEMPHIS, TENN., *Sept.* 17, 1867.

J. M. WILLIAMSON, Esq.,
President Memphis Gaslight Company:

SIR: Feeling that my large interest in the Memphis Gaslight Company is jeopardized by the charter and action of the Memphis Gayoso Gas Company, and by the action of the board of mayor and aldermen in subscribing a large amount of money to uphold and establish the Memphis Gayoso Gas Company, I call upon you to adopt all possible legal measures to restrain the board of mayor and aldermen from making any subscription whatever for said purpose.

THOMPSON DEAN.
By WM. H. FITCH, Jr.,
Attorney.

11 *Exhibit "B" to complainant's bill.*

MEMPHIS, *Sept.*, 18, 1867.

To WM. H. FITCH, Esq., *Attorney in fact for Thompson Dean:*

Your note of the 17th is received, requesting me as president of the Memphis Gaslight Company, to adopt all possible legal measures to restrain the board of mayor and aldermen of Memphis from sub-

scribing a large amount of money on bonds to uphold and establish the Memphis Gayoso Gas Company, and in reply beg leave to state that the undersigned has, in behalf of the Memphis Gaslight Company, already filed a bill in the Court of Chancery of Memphis, against the said Gayoso Gas Company, and has obtained a partial injunction; and the board of directors of this company, do not think proper to proceed further in the premises, and therefore refuse to take any further action.

Very respectfully,

JAS. M. WILLIAMSON,
President Memphis Gaslight Company.

Acts of the general assembly of the State of Tennessee, passed at the first session of the twenty-eighth general assembly, which was begun and held at Nashville, on Monday, the fourth day of October, in the year one thousand eight hundred and forty-nine.

CHAPTER 2.

An act to authorize the establishment of the 'Nashville Gaslight Company.

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That a company, to be entitled the "Nashville Gaslight Company," shall be, and the same is hereby, established, with a capital of one hundred thousand dollars, which may be increased to two hundred thousand dollars, in the discretion of the stockholders and as the wants of the city may require. That the stock of said company shall be divided into shares of fifty dollars each, to be subscribed for and paid as the commissioners, hereinafter named, may prescribe; and the subscribers, their successors or assigns shall be, and they hereby are, created a body politic and corporate by the name and style of the "Nashville Gaslight Company," and shall so continue as long as the terms of this charter are fulfilled, and under such name and title they shall be capable to contract and be contracted with, sue and be sued as natural persons, and they may have and use a common seal, and change, alter, or renew the same at pleasure; and may ordain and put in execution such by-laws, rules and regulations for the good management and control of the affairs of said company as may be deemed expedient, not inconsistent with
12 the constitution and laws of this State and of the United States: Provided the board of mayor and aldermen of the city of Nashville shall assent to the privileges herein granted, so far as those privileges affect the rights, interests, or privileges of the city, or to any part of said privileges so as to make a compact between the city and the company mutually satisfactory, which compact shall be entered upon the minutes of the city, municipal board, and be binding upon the city and the company, but shall in no event increase or enlarge the privileges herein granted to said Gaslight Company.

Sec. 2. The business of said company shall be to establish and construct gas works in the city of Nashville, and they may purchase and

hold as much real estate as may be necessary and expedient for said business, and to secure any debt that may be due them.

Sec. 3. It shall be the duty of said company to establish, within three years from the 1st day of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas-light as may be required.

Sec. 4. To enable said company to establish such works, they are hereby authorized and empowered to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes, or alleys of the city of Nashville, in such manner as to produce the least possible inconvenience to the city or its inhabitants, or to travellers, and to take up the pavements or sidewalks: Provided they shall afterwards repair the same with the least possible delay.

Sec. 5. The said company shall have the privilege of erecting establishing, and constructing gasworks, and manufacturing and vending gas in the city of Nashville by means of public works for the term of fifty years from and after the date of this act. A reasonable price per thousand feet for gas shall be charged in the case of private individuals, to be regulated by the prices in other southwestern cities; and for public lights, such sum as may be agreed upon by the company and the public authorities of Nashville: Provided said company shall never charge more than one cent for every cubic foot of gas used, as may be indicated by the gas meter, or computed by the ordinary rules in such cases; nor shall they ever charge the corporation of the city of Nashville more per cubic foot than they shall be getting at the same time from the majority of the inhabitants of the city using such gas.

Sec. 6. The works and operations of said company shall be so constructed and managed that no annoyance shall accrue therefrom to the health or comfort of the inhabitants of Nashville; and nothing in this act shall be so construed as to absolve the company, their agents or officers from any legal proceedings to restrain or abate any nuisance arising from such works or operations.

Sec. 7. If any person or persons shall injure or destroy any portion of the gas fixtures or other property belonging to said company, or shall wilfully open a communication into the street or other gas pipes, or let on gas after it has been stopped by the company, such person or persons shall be liable for all damages sustained by such proceedings, and also to a penalty not exceeding five hundred dollars, upon conviction by the proper authorities.

13 Sec. 13. That Washington Barrow, John Kirkman, Samuel R. Anderson, N. E. Alloway, and Wm. T. Berry, or a majority of them shall be commissioners to open books for the subscription of stock, which shall be kept open until they may deem that a sufficient amount has been subscribed; they shall then, by advertisement in the newspapers, give at least thirty days notice to the stockholders, to hold a meeting for the election of a board of seven directors, to whom shall be entrusted the management of the affairs of the company, and who shall elect a president from their own number.

Sec. 9. The election of president and directors shall be annual, and they shall fill any vacancy that may occur in their board; the said election to be held at the office of the company at such time as the stockholders may appoint.

To enable any person to act as a member of the board of directors or president he must be the owner of ten shares of stock and be a citizen of this State.

For each and every share of stock he may hold, each stockholder shall be entitled to one vote, which may be given by proxy in the election of the board of directors.

Stock may be transferred on the books of the company at any time previous to one month before the election.

Sec. 10. That if after the expiration of twenty years from and after the first day of January, 1850, the corporation of Nashville should, at any time, resolve to purchase said gasworks from the said Gaslight Company, which they hereby shall have a right to do, the price shall be fixed by arbitrators, one or more to be chosen by the president and directors of the company, and an equal number by the board of mayor and alderman of the city; said arbitrators shall not be stockholders in said company, nor members of said municipal board. They shall take into consideration the value of said gas works, and the lands, buildings, utensils, rights, and interests, and everything thereunto appertaining; and if they agree and so report in writing, their award shall be binding on the parties; but if they should not agree, then the said arbitrators shall select some creditable and disinterested person as umpire between them, whose decision and award in writing, reported to the parties above, shall be binding and conclusive, any law to the contrary notwithstanding.

Sec. 11. If any person or persons shall commit any of the offenses enumerated in the seventh section, he, she or they shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as in other cases of misdemeanor.

Sec. 12. The stock of said company shall all be paid in, within three years from the organization thereof, in such proportions or installments, and at such times and places, as may be required by the directory, and any stockholder failing to pay such installment shall, at the discretion of the directory, forfeit to the company all right, title, and interest in, and to every share on account of which such default may have been made; or the directory at their option may cause suit to be instituted against such defaulting stockholder for the amount due on such forfeited share; and in the event of a forfeiture the shareholders so forfeiting shall still be held individ-
14 ually and personally liable to the creditors of said company, who were creditors at the time of the forfeiture, to the full amount unpaid of each share of stock so forfeited, and the directors may dispose of the forfeited shares at their discretion. The company shall not at any time, by releasing stockholders from payment of their shares, or any part thereof, nor by any other means discharge such stockholder from his liability to the creditors of said

company to the extent of any balance due or to become due on account of unpaid stocks.

LANDON C. HAYNES,
Speaker of the House of Representatives.
JOHN F. HENRY,
Speaker of the Senate.

Passed November 21, 1849.

CRAPTER XXV.

An act to incorporate the town of Elizabethton, in the county of Carter, and the town of Cornersville, in the county of Giles, and for other purposes.

* * * * *

Sec. 15. That W. B. Miller, B. Graham, R. C. Brinkley, W. B. Winchester, W. Howard, D. Looney, Miles Owen, and James Rose be, and they are hereby, appointed commissioners to open books for the purpose of receiving subscription of stock for a gaslight company in the city of Memphis, to be known and designated as the Memphis Gaslight Company, under which name and title the subscribers to the same are hereby incorporated, and clothed with all the powers, privileges, and immunities, and subject to the same regulations and restrictions contained in and defined by an act passed at the present session of the general assembly, entitled "An act to authorize the establishment of the Nashville Gaslight Company," which said act is hereby declared to form, constitute and be a part of this charter, except that the word Memphis is substituted for the word Nashville where the same occurs in said act; and except the commissioners above named are to be substituted for the commissioners named in the eighth section of said act.

LANDON C. HAYNES,
Speaker of the House of Representatives.
JOHN F. HENRY,
Speaker of the Senate.

Passed December 31, 1849.

Acts of the general assembly of the State of Tennessee, passed at the first session of the twenty-ninth general assembly, which was begun and held at Nashville on Monday the sixth day of October, in the year one thousand eight hundred and fifty-one.

CHAPTER XLII.

An act to incorporte the Memphis Gaslight Company.

Sec. 1. Be it enacted by the general assembly of the State of Tennesse, That a company to be entitled the "Memphis Gas-
15 light Company" shall be, and the same is hereby, established, with a capital of one hundred thousand dollars, divided into shares of one hundred dollars each, and the subscribers, their suc-

cessors, and assigns are hereby created a body politic and corporate by the name and style of the "Memphis Gaslight Company," and under such name and style they may sue and be sued, contract and be contracted with, they may have and use a common seal; they may pass such rules, regulations, and by-laws as may be deemed expedient, not inconsistant with the constitution and laws of this State, and of the United States, and shall have succession and continue in existence for the period of ninety-nine years.

Sec. 2. All the rights, privileges, powers, and restrictions contained in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth sections of an act incorporating the Nashville Gaslight Company, passed November twenty-first, 1849, not inconsistent with the first section of this act, shall apply to the Memphis Gaslight Company as fully and completely as though the same were herein fully set forth and incorporated.

Sec. 3. The fifteenth section of an act entitled "An act to incorporate the town of Elizabethton, and for other purposes," passed December thirty-first, 1849, be and the same is hereby repealed.

Sec. 4. Robert C. Brinkley, John Trigg, Henry C. Walker, Samuel P. Walker, and Wiley B. Miller are hereby appointed commissioners for the purpose of opening books of subscription; they shall give ten days notice of the time and place of opening books in the different newspapers published in Memphis, and after fifty-one thousand dollars in stock shall have been subscribed, the commissioners shall give ten days' notice and proceed to elect officers in the manner required in the act incorporating the Nashville Gaslight Company.

JORDON STOKES,
Speaker of the House of Representatives.
M. R. HILL,
Speaker of the Senate.

Passed November 20, 1851.

Private acts of the general assembly of the State of Tennessee, passed at the session of 1857-8.

CHAPTER CXLVII.

An act to amend the charter of the Gaslight Company of the city of Memphis, and to incorporate the Gaslight Company of the city of Clarksville.

Sec. 1. Be it enacted by the general assembly of the State of Tennessee, That it shall and may be lawful for the president, directors, and stockholders in gaslight company in the city of Memphis to increase the capital stock in said company to a sum not exceeding three hundred thousand dollars, subject to the same rules, regulations and restrictions as provided in the original act of incorporation.

DANIEL S. DONELSON,
Speaker of the House of Representatives.
JOHN C. BURCH,
Speaker of the Senate.

Passed, March 18, 1858.

16 *Private acts of the general assembly of the State of Tenecssee, passed at the second session of the thirty-fourth general assembly, which was begun and held at Nashville, on Monday, the second day of October, in the year one thousand eight hundred and sixty-five.*

CHAPTER LXXV.

An act incorporating the Mine City University, in Polk County, and for other purposes.

* * * * *

Sec. 8. Be it further enacted, That it shall, and may be lawful for the president and directors of the "Memphis Gaslight Company" to increase the stock in said company to a sum not exceeding nine hundred thousand dollars, subject to the same rules, regulations, and restrictions as provided in the original act of incorporation; and that this act take effect from and after its passage.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed April 26, 1866.

CHAPTER CII.

An act to incorporate the Edgefield Gaslight Company.

Sec. 1. Be it enacted by the general assembly of the State of Tennessee. That a company to be entitled the "Edgefield Gaslight Company," shall, and the same is hereby, established, with a capital stock of twenty-five thousand dollars, which may be increased from time to time to such sums as the directors may determine, not to exceed the sum of three hundred thousand dollars, which capital stock shall be divided into shares of fifty dollars each.

Sec. 2. Be it further enacted, That the affairs of said company shall be managed by a board of seven directors, to be chosen by the stockholders at such time as they may agree upon, who shall hold their office for one year, and until their successors are elected; in the election of directors, each stockholder shall be entitled to one vote for every share of stock he or she may own.

Sec. 3. Be it further enacted, That said company shall have the power to erect gasworks at such place on the north side of the Cumberland river, in Davidson County, as they may select, and extend their gaslights and pipes to any place or places in Davidson County, north of Cumberland river.

Sec. 4. Be it further enacted, That the board of directors shall elect one of their own members president; and shall have power to appoint such officers and agents as they may, from time to time, deem necessary to carry on the business of the company; shall regulate the

price of gas, and perform such other acts as may be necessary to carry out the intentions of this act.

Sec. 5. Be it further enacted, That the company hereby incorporated shall have all the privileges, and be subject to all the
17 liabilities conferred on the "Nashville Gaslight Company," by an act passed November twenty-first, 1849, which act is to be declared a part of this charter, so far as the same is applicable to and not inconsistent with the foregoing sections.

Sec. 6. Be it further enacted, That A. V. S. Lindsley, E. Cary, R. McClay, W. B. A. Ramsay, J. M. Williams, W. L. Weakley, and John P. White are hereby appointed commissioners to open books to receive subscriptions to the capital stock of said company; and as soon as twenty-five thousand dollars are subscribed, may hold an election for directors, as heretofore mentioned, and organize said company.

Sec. 7. Be it further enacted, That if the company, hereby intended to be incorporated, is not organized within five years from the first day of January, 1866, this act shall be null and void.

Sec. 8. Be it further enacted, That John Donovan, G. P. Ware, Charles Kortrecht, J. L. Saffarans, P. P. Higgins, John C. Creighton, M. D. L. Stewart, are hereby incorporated under the name and style of the "Memphis Gayoso Gas Company," with all the rights, powers and privileges conferred upon the Edgefield Gaslight Company.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed May 23, 1866.

Private acts of the general assembly of the State of Tennessee, passed at the second adjourned session of the thirty-fourth general assembly, which was begun and held at Nashville, on Monday, the fifth day of November, in the year one thousand eight hundred and sixty-six.

CHAPTER XV.

An act to incorporate the Cumberland Manufacturing Company, and for other purposes.

Sec. 7. Be it further enacted, That it may and shall be lawful for the president and directors of the Memphis Gayoso Gas Company, to increase the stock in said company, to a sum not exceeding one million dollars; subject to the same rules, regulations and restrictions as provided in the original act of incorporation.

WILLIAM HEISKELL,
Speaker of the House of Representatives.
JOSHUA B. FRIERSON,
Speaker of the Senate.

Passed December 4, 1866.

18 Circuit Court of the United States for the district of West Tennessee.

Pleas in abatement.

THOMPSON DEAN
vs.
THE MEMPHIS GAYOSO GAS COMPANY *et al.*

The defendants, the Memphis Gayoso Gas Company, for plea in abatement, herein say:

That this court has no jurisdiction of the matters and things set up in the aforesaid bill of complaint.

1. Because, admitting it to be true that the complainant is a non-resident stockholder, of the State of Tennessee, in the Memphis Gas-light Company, the said latter company is a resident corporation of the said State of Tennessee.

2. It is not true as alleged in the said bill of complaint, that the president and directors of the said Memphis Gaslight Company have refused to take all necessary, proper and legal steps to assert and maintain the rights of the complainant, and all other stockholders in the Memphis Gaslight Company in this behalf; on the contrary, the said president and directors did permit and authorize a bill to be filed in the Chancery Court of Memphis, a State Court of Tennessee, having full, complete and ample jurisdiction and powers in the aforesaid premises, wherein the same relief was sought, and the same matters of complaint urged, in all substantial and material regards as the relief sought and complaints urged in complainant's aforesaid bill, all of which will appear from the inspection of the record of the cause entitled on the dockets of said Chancery Court of Memphis, "Memphis Gaslight Company *vs.* Memphis Gayoso Gas Company," which record is here tendered to this honorable court, with this plea, for inspection, which cause is now pending and being prosecuted by the attorneys of the said Memphis Gaslight Company in the said Chancery Court, which attorneys are the same who are now prosecuting complainant's aforesaid bill; and the aforesaid bill filed in the Chancery Court, asserts on behalf the Memphis Gaslight Company of which the complainant is a member, every right and privilege, and claims on behalf of said company all relief to which they can have any color of claim in law or equity.

3. The said cause of the Memphis Gaslight Company *vs.* the Memphis Gayoso Gas Company," is still pending in the said Chancery Court of Memphis, where the same relief is sought as in complainant's bill, and where the same matters are presented for adjudication, between this defendant and the said Memphis Gaslight Company, as are presented in complainant's bill; the said complainant being a stockholder in the said Memphis Gaslight Company, and the said Chancery Court of Memphis being a court having full and ample jurisdiction in the premises, to grant all the relief and remedies sought in this bill of complaint; and the said Memphis Gaslight Company,

have applied for and been refused the relief sought in this bill of complaint, except to a limited extent, and to the extent
19 granted them, the said Memphis Gaslight Company are holding this defendant bound by and subject to the order of the said Chancery Court of Memphis made in that behalf; and defendant again tenders, with this plea, the record of the cause of the "Memphis Gaslight Company *vs.* The Memphis Gayoso Gas Company," with the fiat of the chancellor of the said court thereon, for the information of this honorable court, where defendant prays judgment, etc.

(Signed) KORTRECHT & CRAFT.
T. W. BROWN,
For Gayoso Gas Company.

R. J. MORGAN, *For City.*

Oath to foregoing plea waived.
McRAE, *Attorney for Complainant.*

To the Honorable William M. Smith, Chancellor presiding in the Chancery Court of Memphis:

The "Memphis Gaslight Company," a corporation duly incorporated by the laws of Tennessee, and having its place of business in the city of Memphis, files this, its bill of complaint, against the "Memphis Gayoso Gas Company," also a corporation which has its chief office at Memphis.

And the complainant shows to your honor, that in the year 1849 the legislature of the State of Tennessee passed an act incorporating the "Nashville Gaslight Company," and by said act of incorporation the legislature granted to said company the privilege of erecting, establishing, and constructing gasworks, and manufacturing and recording gas in the city of Nashville, by means of public works, for the term of fifty years from and after the date of this act, and by the fourth section of said act it was enacted as follows:

To enable said company to establish such works, they are hereby authorized to lay down pipes, and extend conductors and other apparatus through all or any of the streets, lanes, or alleys of the city of Nashville in such manner as to produce the least possible inconvenience to the city or its inhabitants or to travelers, and to take up the pavements or sidewalks; provided they shall afterwards repair the same with the least possible delay, and for a compensation they might charge a reasonable price per thousand feet for gas, in the case of private individuals, to be regulated by the prices in other southwestern cities, and for public light such sum as may be agreed upon by the company and the public authorities of Nashville. By the seventh section it was enacted that a penalty of five hundred dollars should attach to any person or persons who should injure or destroy any portion of the gas fixtures or other property belonging to said company, or wilfully open a communication into the street, etc.; and by the tenth section, that if after the expiration of twenty years the corporation of Nashville should resolve to purchase said gas-

works, it should have the right to do so, etc.; all of which will more fully appear by reference to the act of incorporation above referred to.

20 And complainant further shows to your honor, that at the same session of the legislature W. B. Miller, R. C. Brinkley, and others, of Memphis, were appointed commissioners to open books of subscription of stock for a gaslight company in the city of Memphis, to be known and designated as the Memphis Gaslight Company, under which name and title the subscribers to the same were incorporated and clothed with all the powers, privileges, and immunities, and subject to the same regulations and restrictions contained in and defined by the act passed at the same session, entitled "An act to authorize the establishment of the Nashville Gaslight Company," which act is hereby declared to form, constitute, and be a part of this charter, "except that the word Memphis is substituted for the word Nashville, where the same occurs in said act."

And complainant further shows, that by said act of incorporation it was to have three years to establish its manufactory, which was to be of sufficient capacity to supply the corporate authorities and inhabitants with such public and private gaslights as may be required.

And complainant further shows, that thereafter, to wit, at the session of the general assembly held in 1851, renewed the said act of incorporation to the Memphis Gaslight Company, conferring on the said company all the rights, privileges, favors, and restrictions contained in the second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh, and twelfth sections of the act incorporating the Nashville Gaslight Company, passed November twenty-first, 1849, not inconsistent with the first section of this act; and by the fourth section of said act W. B. Miller, and R. C. Brinkley and others were again appointed commissioners to open books of subscription.

Complainant further shows, that the charter of incorporation was duly accepted and the books of subscription were duly opened, the necessary stock taken, the company duly organized, and within the three years prescribed in the first act of incorporation, the company established its gas manufactory and began to perform the duties incumbent upon it by the said acts of incorporation.

And complainant is advised, and so insists, that the act of 1851 does not in anywise repeal the act of 1849, except as to the tenth section thereof, but is in addition thereto, and runs pari passu therewith; and the two acts are to be construed together, being strictly in "pari materia," and by these said acts the complainant was well entitled to all the rights and privileges as a gaslight company, at Memphis, which by this act of incorporation the Nashville Gaslight Company was entitled to at Nashville.

Complainant further shows to your honor, that besides the duty of supplying the corporate authorities of Memphis with public lights, and of agreeing with them upon the sum to be charged therefor, the charter of the city of Memphis was amended, and among other things it was enacted that the mayor and aldermen should have power to

preserve the health of the city and to preserve and improve the streets, to convey water from the vicinity into the city, to provide for the lighting of lamps, and the erection of all buildings necessary for the use of the city, together with other municipal powers in said act specifically set forth and declared.

21 And complainant further shows that in obedience to the obligations imposed by its charter, it proceeded by its proper officers to contract with the mayor and aldermen of the city, and on the eighteenth day of March, 1852, the contract of which a copy is hereto appended, marked "A," as an exhibit to this bill, was made and entered into by complainant and the mayor and aldermen of the city of Memphis by said contract, the company was required to furnish the public lights at a much less price than it could sell to private individuals, to wit: at one-half the price which it charged private consumers, and this was imposed upon it as a perpetual obligation so long as its charter continued, and it was obliged to avail itself of all new improvements and discoveries, and furnish the city of Memphis with gas at corresponding reduced rates, and as a part of the said contract the mayor and aldermen undertook to protect the said company in all its chartered rights, and to punish by ordinance all infringement thereof, all of which will more fully appear by reference to said contract.

And complainant further shows that since the organization of the company, and since the contract hereinbefore referred to was made and entered into by complainant with the mayor and aldermen of Memphis, and after the complainant had incurred a heavy expense in the construction of works, and the purchase of material, and the employment of labor, and after complainant had for many years supplied the public authorities of Memphis with public lights and the inhabitants with private gas lights as its charter required, that at the session of the general assembly held in 1866, that body ratified and confirmed the existence of complainant as a corporate body legitimately exercising its functions and enjoying its privileges and discharging its obligations at Memphis in the manner and by the means in this bill heretofore set forth, and did by special enactment authorize and empower its president and directors to increase the stock of said company to nine hundred thousand dollars subject to the same rules, regulations, and restrictions as in the original act of incorporation.

And complainant is advised and insists that inasmuch as the complainant was expressly required to contract with the mayor and aldermen, and furnish the public lights to the corporate authorities at an agreed sum, and was also required to supply all the inhabitants of the city of Memphis who might demand to be supplied with gas-lights at a regulated cost, and inasmuch as was expressly required by its charter to establish a gas manufactory adequate and sufficient for its purpose, it was plainly the intention of the legislature to grant the exclusive privilege of laying down pipes in the streets and manufacturing and vending gas in the city of Memphis by means of public works, free from the molestation or disturbance or competition of all and every other person or persons whatsoever; and this purpose of

the legislature so to grant to complainant the exclusive privilege in the premises, is further apparent in the careful manner in which it guarded the fixtures and other property of complainant from injury or destruction during the continuance of its franchise.

And complainant further insists that by the very nature and purpose of its incorporation the powers, rights, and privileges must be considered to be exclusive, and because they were so intended the legislature in its charter undertook to regulate its charges and
22 to guard the public and the inhabitants from anything like a monopoly; and complainant further shows that it was the purpose and intent of the mayor and aldermen in entering into the contract hereinbefore referred to with complainant, not only to vest the exclusive privilege of furnishing the public lights to the corporate authorities, but also to license the complainant for and during the period of twenty years, to have the exclusive privilege of manufacturing and vending gas for lights to the inhabitants by means of public works, and if this purpose is not explicitly set forth in said contract it was a mistake of the draughtsman, which ought to be reformed in this honorable court.

But complainant charges that this intention is explicit in the contract itself, because it is manifest that the furnishing the public lights was not a privilege but an obligation, and the exclusive privilege could only relate to the vending to the inhabitants of the city at large; for complainant doubts not your honor will perceive that it would have been suicidal to their interests, if after obliging itself to furnish the public lights at one-half the cost at which the inhabitants should be charged, by the very same contract it should leave open the door for a competitor who would divide the profits of the private sales and have no burden of obligation to supply the public lights at the restricted price; the exaction of this obligation by the mayor and aldermen, its imposition by the legislature, and its acceptance by the complainant, as complainant is advised and insists, will be regarded by your honor as an equivalent which the legislature and the corporate authorities exacted for the exclusive privilege which was conferred upon complainant.

Yet so it is, may it please your honor, notwithstanding the premises and notwithstanding the clear and manifest rights of complainant therein, complainant charges that the defendant, claiming to have some rights for that purpose has assumed to organize as a corporation and has already entered upon certain of the streets of Memphis whereupon complainant's gas pipes have been laid down, and its conductors extended, and its other apparatus constructed, to wit: upon Main street, and has commenced to dig the same, and has laid down gas pipes therein at a short distance from and parallel with complainant's, and is extending conductors, and other apparatus, and is preparing to cross the line of complainant's pipes, which defendant can only do by digging around and above or below or through the soil of complainant, in which complainant already has an easement in which it is entitled to be protected, not only because complainant has the exclusive privilege, but if not, it has at least an easement in the soil

wherein its pipes are laid which defendant cannot disturb, without making compensation, which it does not propose to do.

And furthermore the said defendant is threatening or actually preparing to construct public works for the manufacturing of gas lights, and purposes from the same by means of said pipes, conductors, etc., to vend the same to the inhabitants of the city of Memphis, whom complainant is required by its charter to supply and for whose supply complainant has established and always kept a manufactory of sufficient capacity, as required by its acts of incorporation, and the
23 defendant, as complainant is informed and charges, has the purpose and intention at various portions of the streets to lay its pipes along and under the sidewalks and so to cross the service pipes of complainant, which lead from its mains to the dwellings which it supplies, its mains lying along the gutter at the edge of the side walk, and complainant alleges that this conduct of the defendant will materially hinder and obstruct complainant in its rights, and interfere injuriously with its interests.

For complainant shows to your honor that in the construction of its pipes, it is necessary to lay them upon an inclined plane for the reason that the gas passing through them or locked up in them forms a liquid ammonia which must be expelled, and this can only be done by laying the pipes on such a grade or fall as will enable the liquid to run off into drip boxes, which complainant has placed at suitable points for its reception; the defendant proposes and is actually engaged in laying its pipes above and so contiguous to these pipes and boxes of complainant, that in the change of the grade or level of the streets that it will be impossible for defendant to conform to such change of grade, and thus irreparable mischief and a constantly recurring damage will be done to its works and a constant disturbance of its privileges and franchise.

Complainant further shows to your honor that the defendants have already and are continuing to lay its pipes at such points where they cross the mains and service pipes of complainant, and at but a few inches above and quite touching those of complainant, which again materially injures the complainant in the enjoyment of its franchise; as above stated, complainant is obliged to supply sufficient gas for all the inhabitants of Memphis; to do this complainant has constructed its mains, and service and cross pipes of such size as suited the existing demand, and the increasing population, and corresponding increase of demand for gas necessitates frequent changes in the diameter of the pipes, so as to enlarge their size, and it will be impossible for complainant so to lay pipes of increased size if the defendant is permitted to go on and lay its pipes above those of complainant, and contiguous to it or indeed upon it at all, and the result of this action of defendant if allowed to go on will be to prevent complainant from fulfilling the obligations of its charter, or to drive it from the soil upon which it has already established an easement and in which it has secured a right, and will compel complainant to go to very heavy expense in changing its pipes and their position.

And complainant charges that the acts of the defendant are a con-

stantly and daily recurring injury and wrong to complainant which will involve it in a multiplicity of suits, and are destructive of the franchise of complainant, and will impose upon complainant a heavy loss by reason of the great outlay which complainant has undergone to construct and fit out, and keep always adequate and sufficient means of supply for the corporate authorities and all the inhabitants, as it is obliged to do by its charter.

And complainant further charges that if defendant is permitted to go on and construct its works and operate them in the manner proposed, the effect will be greatly to depreciate the value of
24 complainant's franchise, and especially to injury the value of extensive works, which complainant was obliged to construct in order to have a manufactory sufficient to supply the inhabitants with gas, as its charter required, which would be a wrong and injustice which the legislature could never have intended to practice on its citizens.

And complainant further charges that the defendant has no corporate or individual right to do and perform the acts which it is meditating and accomplishing; it has no charter from the legislature which vests any such authority, and its acts in entering upon the streets and obstructing the public thoroughfares, as complainant is advised, are a public nuisance, which any citizen may call upon this honorable court to repress; complainant is informed that the only claim which the defendant makes of right so to use the streets and do the other acts which it meditates, is based on an act of the general assembly which is said to have passed on the twenty-sixth day of May, 1866, by which it is said to be enacted, that "John Donovan, G. P. Ware, Charles Kortrecht, J. L. Saffarans, P. P. Higgins, John C. Creighton, and M. D. L. Stewart are hereby incorporated under the name and style of the Memphis Gayoso Gas Company, with all the rights, powers and privileges conferred upon the Edgefield Gaslight Company," will be found in the act of incorporation of that company passed on the same day with the act last above mentioned, and all the rights of said company to erect gasworks, or lay pipes or do any other things thereabouts, is to be found in the third section of said act as follows: "that said company shall have the power to erect gasworks at such places on the north side of Cumberland river, in Davidson County as they may select, and extend their gaslights and pipes to any place or places in Davidson County, north of Cumberland river."

And so complainant charges that defendant does not, by any proper or just construction which can be given to the act under which it claims (even if said act has been regularly enacted) derive any authority, right, power or privilege, to construct public works for the manufactory of gas in Memphis, or any right to lay down gas pipes in the streets of said city of Memphis, or otherwise to interfere with the chartered privilege of complainant, to supply the corporate authorities of Memphis and the inhabitants thereof with such gas for lights as they may need, and defendant is acting without any authority or right in the matter, and to the great damage and injury of complainant.

Wherefore and because of the premises, and because complainant is without adequate remedy except in this honorable court, complainant prays your honor that defendant, the "Memphis Gayoso Gas Company," may be made party defendant to this bill and may be served with due process to answer the same, and that by a fiat of injunction issued out of this honorable court the said Memphis Gayoso Gas Company, its agents and employees, may be restrained and enjoined from further interference with the streets of Memphis for the purpose of laying gas pipes, conductors or other apparatus, and that it may be restrained and enjoined from erecting or causing to be erected any public works for the manufacturing of gas for sale in Memphis, or from vending gas to the corporate authorities or to the inhabitants, or from interfering in any other manner or form with the rights of complainant in the premises, or the privileges of its franchise.

Complainant further prays an injunction restraining defendants from laying their pipes above or contiguous to complainant's, and that defendants be required on final hearing to lay their pipes from two feet to thirty inches below the pipes of complainant, so as to avoid and prevent the irreparable injury which will otherwise be done to complainant's franchise and property.

And for such other and further relief as to your honor shall seem proper; and complainants will ever pray, etc.

This is the first application for an injunction in the premises.

HUMES & McRAE,
Solicitors for Complainant.

STATE OF TENNESSEE, *Shelby County:*

Personally appeared before me, W. H. Fitch, jr., Secretary of the Memphis Gaslight Company, and made oath that the facts set forth in this bill are true to the best of his knowledge and belief.

WM. H. FITCH, Jr.,
Secretary.

Sworn to and subscribed before me, September 9, 1867.

R. J. BLACK, *D. C. & M.*

Upon complainant giving bond, with security, in the sum of $5,000, the clerk and master will issue the writ of injunction restraining defendants from laying their gas pipes above those of complainant, or so near to them as to cause injury to them.

I decline ordering an injunction restraining defendants from proceeding with their gasworks, as I do not see that any exclusive privilege has been conferred on complainant.

WM. M. SMITH,
Chancellor.

September 12, 1867.

This contract and agreement, made and entered into this eighteenth day of March, 1852, by and between the mayor and aldermen of the

city of Memphis of the one part, and the Memphis Gaslight Company of the other part, witnesseth:

The mayor and aldermen of the city of Memphis, for the purpose of encouraging the construction of gasworks, to light the city of Memphis, and for the consideration hereinafter expressed, hereby grant to the "Memphis Gaslight Company," a corporation which has just been organized, the following privileges:

26 1. They shall have and exercise the exclusive privilege for twenty years of lighting the city of Memphis, with such public lamps as may be agreed upon between said corporation and the city authorities of Memphis, with gas or any other new invention which may hereafter be devised or discovered for the purpose of lighting a city within the corporate limits of Memphis, as at present laid off, or such district or districts as may hereafter be added to the city of Memphis, provided the said "Gaslight Company" shall avail themselves of any new invention or improvement which hereafter may be devised or discovered in the manufacturing of gas, which shall come into use in other southern cities, by which supplying the city with gaslight shall be cheapened. The said Gaslight Company agree to furnish the city of Memphis with gaslight at corresponding reduced rates; and if the said Gaslight Company shall avail themselves of any other invention which may be discovered for lighting the city, and lights become cheapened thereby, then the said company will furnish the city at corresponding rates; and provided, that if the city of Memphis should determine to discontinue the use of said gaslights, at the expiration of twenty years, or at any time thereafter, the said city shall give the said company one year's notice of such intention in writing.

2. The mayor and aldermen of Memphis, to enable said company to establish such works, hereby grant to said company, now and hereafter, authority to lay down pipes and extend conductors and other apparatus through all or any of the streets, lanes, alleys, squares, or other public places in the city of Memphis, according to the established grade of the same, in such manner as to produce the least inconvenience to the city or its inhabitants, and to take up, if necessary, the pavements and sidewalks, provided they shall, at their own expense, repair the same streets and pavements without unnecessary delay.

3. If any person or persons shall injure or destroy any portion of the gas fixtures or other property belonging to said company, or shall willingly open a communication into the street or other gas pipes, or let on gas after it has been stopped by the company, or shall in any manner or shape whatever injure or otherwise damage the works and fixtures of said company, in addition to the remedy afforded said company by the seventh section of the act incorporating said company, the mayor and aldermen of Memphis agree, by all suitable ordinances within the limits of their power, to protect said company in the enjoyment of the chartered rights, and to punish by fines and otherwise all infractions on their rights.

4. Said "Memphis Gaslight Company" shall have and exercise

all the rights and immunities granted them by the charter incorporating the same within the limits of the city of Memphis, without any other charge or tax by the corporate authorities of Memphis, than upon the estimated value of their house and lot, and one hundred dollars per annum. Still further to encourage said Gaslight Company, the mayor and aldermen of Memphis agree to take fifty public lamps to begin with, to be extended hereafter as the public wants and increase of the city may demand, and such as may be agreed upon by the said company and the mayor and aldermen of Memphis.

27 5. In consideration of said several grants, concessions and privileges, the Memphis Gaslight Company, agree and bind the company to furnish the city of Memphis, for the use of their public lamps, gas at one-half the price which they charge private consumers.

6. It is expressly understood and agreed upon, between the mayor and aldermen of Memphis and the "Memphis Gaslight Company," that said company shall only be required to furnish gas for public lamps along the line of main.

7. It is also understood and agreed upon between the contracting parties that the corporate authorities of Memphis are always to furnish at their own expense their public lamp posts and lamps and other fixtures, and keep the same in order.

The committee to whom was referred the contract with the "Memphis Gaslight Company," after several meetings with committee on the part of the gaslight company, have agreed to the within contract, and recommend its adoption by the board of mayor and aldermen.

Committee of Aldermen.

S. W. JEFFERSON.
SAM. P. WALKER.
A. WOODRUFF.

Committee on behalf of Memphis Gaslight Company.

WILLIAM RUFFIN,
President Gas Co.
JAS. M. WILLIAMSON,
Director.
T. S. AYRES, *Director.*

The foregoing contract was confirmed by the board of Aldermen of the city of Memphis on the eighteenth day of March, 1852, and approved by the mayor.

SAM. P. WALKER,
Mayor pro tem.

W. HOUSTON, *Recorder.*

A true copy; attest:

A. ALSTON, *Clerk and Master.*
By R. J. BLACK, *D. C. & M.*

THOMPSON DEAN
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS, The Memphis Gayoso Gas Company, and the Memphis Gaslight Company.

This cause coming on to be argued upon the bill and pleadings filed, it is ordered that the plea to the jurisdiction be overruled, and the court takes jurisdiction of the parties and the subject matter of the bill; and upon the presentation of the record from the chancery court of Memphis, it is considered that no prior suit is pend-
28 ing between the parties, and for the subject matter, and the plea of a prior suit pleading is overruled.

And upon the argument it is further considered, and it is so ordered that upon the complainant's entering into bond, with good and sufficient security, in the sum of ten thousand dollars, to the board of mayor and aldermen of the city of Memphis, conditioned to save harmless, the said corporation, from all loss and damage by reason of the injunction prayed for in the bill; and upon the complainant's entering into a further bond to the Memphis Gayoso Gas Company in the sum of seventy-five thousand dollars, conditioned to save harmless, the said corporation, from all loss and damage by reason of the prosecution of the injunction prayed for in the bill, the clerk will issue a fiat of injunction to the board of mayor and aldermen of the city of Memphis, restraining them from holding any election to test the sense of the voters of the city upon the question of subscribing to stock in the Memphis Gayoso Gas Company, or for issuing bonds therefor, and restraining said board from making such subscription, or issuing such bonds, and a further fiat of injunction to the Memphis Gayoso Gas Company, restraining the said company, its agents and employees from using the streets of Memphis, by laying pipes thereon, or from constructing works for the manufacture and sale of gas in the city of Memphis by the means of such pipes, conductors and other apparatus laid through the said streets, or lanes or squares of said city, or from selling gas to the public authorities or inhabitants of Memphis, by means of such public works, until the further order of this court.

29 United States Circuit Court, district of West Tennessee.

THOMPSON DEAN
vs.
MEMPHIS GAYOSO GAS COMPANY *et al.*

John Donovan says that he is president of the Memphis Gayoso Gas Company, one of the defendant to this suit.

That the delay occurred by the provisional injunction, granted in this case, would be of the gravest character, particularly if the delay should continue for any length of time.

He says that the penalty of thirty-five thousand dollars is wholly inadequate.

He states that nothing short of one hundred thousand dollars, would be at all an adequate penalty, so far as the Memphis Gayoso Company is concerned, and he respectfully suggests that the bond required of the complainant be, in justice to the company, increased to this sum.

The sum of thirty-five thousand dollars, would be insufficient to cover the work already done, and that now under way, for which his company must pay, if even now arrested in this enterprise.

(Signed) JOHN DONOVAN, *President.*

Subscribed and sworn to before me. October 15, 1867.

(Signed) ISAAC MORRISON,
United States Commissioner.

The separate answer of the Memphis Gayoso Gas Company to the bill of complaint of Thompson Dean, filed against it and others in the Circuit Court of the United States for the district of West Tennessee.

Defendant admits the residence of petitioner as alleged; and that he owns a large number of the shares of stock in the Memphis Gaslight Company.

It is true that the Nashville Gaslight Company was chartered by act passed, November twenty-first. 1849, by the general assembly of Tennessee. The second, third, fourth and fifth sections of said act of November twenty-first, 1849, are correctly recited by complainant.

It is also admitted that the same session of said general assembly, and on the thirty-first (not twenty-first as complainant alleges,) of December. 1849, by the fifteenth section of an act to incorporate the town of Elizabethton and for other purposes, incorporated the Memphis Gaslight Company. R. C. Brinkley, W. B. Miller and others, were appointed commissioners to organize, etc.

No part of said act but said fifteenth section applied to said Memphis Gaslight Company; but said fifteenth section referred to and adopted the charter of the Nashville Gaslight Company, substituting the word Memphis for the word Nashville as often as it occurred in the Nashville charter.

On the twentieth of November, 1851, the general assembly of the State, granted a second charter of incorporation to the Memphis Gaslight Company, essentially different in many particulars from the first. The second charter was granted by an act of four sections.

The first section created the corporation, gave the corporate name, capital stock and period of existence.

The second confered all the rights, powers, privileges and restrictions, contained in the 2d, 3d, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th and 12th sections of the Nashville Gaslight charter, not inconsistent with the first section of said act of 1851.

The fourth section named Robert C. Brinkley, W. B. Miller and others, as commissioners, and pointed out the mode of organization.

And the third section expressly repealed the fifteenth section of

the act incorporating the town of Elizabethton passed on the thirty-first of December, 1849, and which fifteenth section as before shown conferred the first charter on the Memphis Gaslight Company. And thus it will be seen that the Memphis Gaslight Company can claim no benefit whatever from the charter of December thirty-first, 1849, because it was expressly repealed by the third section of the second charter. Moreover, said Memphis Gaslight Company accepted the second charter and organized under it, having never organized previous thereto; the rights of complainant must therefore depend solely upon the charter of 1851.

Defendant submits before leaving this branch of the subject, that it is strange that complainant should rely upon the provisions of a charter repealed by the act under which his company organized.

It may be explained by the fact that complainant felt hard pressed for grounds to rest his case upon and caught at the dead charter as a forlorn hope.

The Memphis Gaslight Company was organized within three years from the first of January, 1850.

Said company erected a gas manufactory in Memphis, but it is not admitted that it was of sufficient capacity to supply the corporate authorities and inhabitants with such public and private gaslights as might be required. Said company laid its pipes, and extended its conductors and other apparatus along some of the streets, alleys, lanes and squares of the city; but not on all of the streets, alleys, lanes and squares of the city; many streets, lanes, alleys and squares, to this day, are not penetrated by the pipes, conductors and other apparatus of said company.

It is true that said company manufactured and sold gas to the public authorities and inhabitants, but defendant cannot admit that said sales were in conformity to its charter; it denies that such was the fact. It is true that in 1858 said general assembly authorized an increase of the capital stock of said company to the sum of $350,000.

But said general assembly did not at the same time ratify all the corporate acts of said company; not a word on the subject of ratifying such acts can be found in the act giving the authority to raise the capital stock to $350,000; nor is anything contained in the act to justify such an inference.

31 Defendant denies that the legislature ever ratified or intended to ratify the corporate acts of said company.

It is true that in March, 1852, said company entered into the contract with the city authorities, a copy of which is exhibited with the bill of complaint.

For the terms and scope of this contract reference is respectfully made to the contract itself. It is true that by said contract the city gave said company the exclusive privilege of lighting the city with such public lamps as might be agreed upon between the parties for twenty years and until thereafter notified to the contrary as provided by said contract, and the right to enter upon the city's streets, alleys, lanes, and squares, and lay its pipes, conductors, and other apparatus according to the established grade of such streets, etc., and to exercise all the

rights granted by the charter, subject to be taxed by the city authorities only on the estimated value of its house and lot and one hundred dollars per annum.

It is true that the said company agreed in said contract to furnish the city, for its public lamps, gas at half the price charged private consumers; but defendant denies that anything in this contract or in the charter of said company gave it the exclusive right to manufacture and vend gas in the city of Memphis, or the exclusive right to the streets, alleys, lanes, and squares of the city.

Said contract contains no exclusive term or provision except that in reference to supplying the city with such public lights as might be agreed on for twenty years; nor would it have been in the power of the city to have extended the corporate franchise of said company so as to confer such exclusive right if the city had desired it, because the charter expressly forbids any contract with the city which will enlarge the franchise of said company, and this inhibition is contained in the very section of the charter that authorizes the city and company to contract.

Defendant denies that said contract binds the city to encourage no rival company for twenty years, or to take no stock in a rival company for twenty years, or agrees to give the said company the exclusive use of the city for twenty years, or for any period. The contract will be searched in vain for any such terms. They do not exist.

In 1867, authority was given by the general assembly to said company to increase its capital stock to $900,000. This was all that was then granted; not the smallest thing in addition.

Yet complainant alleges that the legislature at its session of 1867 again ratified the corporate acts of the company, and authorized it to "increase its capital stock to $900,000." Such an allegation is well calculated to mislead. From this statement it would hardly be supposed that all that was done was simply to authorize, at the special instance of the company, an increase of its capital stock and nothing more.

This act, judging from the allegation, contains a recital of the corporate acts of the company and ratifies them, and by way of a reward to merit gives authority to raise the capital stock, but such is far from the fact. Defendant denies that such ratification ever occurred by any act of the general assembly. Defendant admits that the Edgefield Gas Company was chartered by said general assembly in May, 1866,
32 and that the substance of the third section of the act of incorporation is correctly given by complainant, and that on the same day, and by a section of the same act, the Memphis Gayoso Gas Company was incorporated, that all the rights, powers, and privileges of the Edgefield Gas Company, and none other, were conferred upon the Memphis Gayoso Gas Company, and that the rights, powers, and privileges of the Edgefield Gas Company are coextensive with those of the Nashville Gaslight Company, so that defendant is entitled to all the privileges of the Nashville Gaslight Company, and if complainant means to charge that anything less was

given to defendant, then the charge is met with a denial; but if the same, then it is true.

Defendant organized on the day of , 186 , and after its organization, and with a full knowledge upon the part of the legislature of the fact, and that it claimed the right to establish and erect gasworks in the city of Memphis under its charter, its capital stock was increased to the sum of $100,000 by an act passed on the day of , 1866.

Defendant admits that said old company purchased, after its organization. a valuable real estate and constructed thereon a gas manufactory, but it does not admit that said factory was sufficient to furnish the public authorities, nor the inhabitants of Memphis with gas for lights, public and private. It is admitted that said company has laid down its pipes, conductors, and apparatus on many of the streets, alleys, squares, and lanes of the city, and extended the same from time to time at considerable cost and outlay, and enlarged to some extent its works. But defendant denies that said company does now or ever did keep its works in condition to fulfill all its obligations towards the city and its inhabitants, imposed by its charter and contract with the corporate authorities, or that said company ever complied with its charter or its contract with the city.

Defendant admits that it has established an office in Memphis, and claims the right to construct gasworks in the city of Memphis, and that it is actually engaged in so doing; that it has laid its service pipes across the mains and service pipes of the Memphis Gaslight Company in many places. That in the prosecution of its work at the crossings it has found it necessary to displace the soil to a greater or less extent; but at no point have the pipes of said company been displaced or disturbed, nor have the pipes of defendant been suffered to touch those of said company.

The contiguity of the pipes occurs only at the crossings, where it is unavoidable; but at all times great care has been taken to allow said company ample space for the convenient, safe, and profitable use of its works. At every point the space allowed is so great as to afford said company the opportunity to more than quadruple the present capacity of its pipes, without bringing the pipes of the two companies in contact, and without laying down an additional line of pipes.

In other and larger cities it is common for many pipes to cross near, and at times to rest on each other, forming a sort of net work, without injury or inconvenience from one another.

It is usual, as defendant is informed, when a company wishes to enlarge its capacity to lay near to the old line and parallel with it, say from four to six inches apart, a new line of pipes; and if said company wishes to adopt this mode most ample space is allowed on
33 parallel lines. The pipes of defendant and said company are many feet, and often many yards separated. Defendant denies that in any changes that may ever occur in the grade of the streets, lanes, alley, or squares, its pipes can be in the way of said company, or injure it any way; and denies that during the existence of its charter any possible increase of its capacity can ever be obstructed

by the manner in which defendant's works are constructed and located, in reference to the works of said company.

Defendant admits that it is preparing to manufacture gas by its works and to sell the same in competition with said company. It is true that the corporate authorities passed an ordinance on the seventeenth of September, 1867, on its first reading, in substance as stated by complainant. But defendant denies that anything in the supreme law, in the charter of said company, or in its contract with the city forbids such an ordinance.

Nor can defendant discover that the corporate authorities can exercise in said election any sinister influence upon the qualified voters; nor how such an apprehension can be the grounds of interference by the energetic arm of the Court of Chancery by its writ of injunction, defendant cannot see.

Defendant can conceive of no influence except to show the misdeeds of said company—to show its extortion, its unfairness, its bad faith, and that the public as well as the private good demands that a limit be set to the rapacity of this pampered monopoly.

Defendant denies that the mayor and aldermen have no power to order said election and subscribe said stock. No feature of the charter of said company forbids such subscription; no feature of the contract forbids it; no term or provision of the contract engages the city not to take stock in or encourage a rival gas company. If such a provision exists, defendant has been unable to discover it, and complainant has failed to point it out. To bind the city and its inhabitants by remote implications and fine drawn inferences, in the absence of any express stipulation in charter or contract—to lie under the power of a grinding and oppressive monopoly for ninety-nine years would be to violate all sound rules of interpretation.

The fact that the exclusive right to furnish the city with public lights for twenty years was stipulated for, and that even this the city reserved the right after twenty years to rescind, and that the term "exclusive" was applied to no other feature of the contract, is conclusive against the construction contended for by complainant.

Defendant denies that in any part of the charter of said company there is any exclusive right given; on the contrary, there is a total absence of any such provision. Such rights are not favored. They are never raised by implication, nor created, nor extended by construction; never allowed except where the language testifies the legislative intention so plainly as not to be misunderstood. The rule of interpretation is most favorable to the public and strict against the the grantee, and to be in doubt as to whether the franchise is exclusive or not, is to be resolved against the grantee.

It is respectfully submitted that the rules of interpretation forbid an exclusive right to be raised by inference from duties imposed.

34 It is denied that it is a rule of construction that the extent of the duty is the measure of the franchise, and that the privilege is great or small, exclusive or non-exclusive, in proportion to the burdens imposed on the company. It is respectfully submitted that the privileges granted must be found in the charter in unequiv-

ocal terms; and that sound public policy denies all exclusive grants, monopolies and franchises, where there is a doubt as to the true construction. The doubt weighs against the exclusive right.

It is submitted that the fact that a maximum rate of charges is fixed in a charter, is no ground for asserting the franchise to be exclusive; such restrictions are almost universal and would turn all corporations into monopolies. No such rule of interpretation can be found as defendant confidently believes.

Defendant denies that said company has performed all its obligations to the city and the public under said contract and under its charter; on the contrary, defendant charges:

1. That said company has made and vended inferior gas.
2. That it has refused to light the public buildings of the city.
3. That it refused to lay pipes from Front row to the landing or wharf, in all that part of the city from Adam street to Union street, upon the ground that it would not be profitable to the company, and forced the city to lay said pipes at its own costs.
4. That it has refused to extend its pipes into localities that needed lights, upon the ground of the private interest of the company.
5. That it has not kept pace with improvements in its business, greatly to the prejudice of the community and for its own gain and profit.
6. That it has deliberately and systematically violated and disregarded the maximum rate of charges fixed in its charter, and has exacted and wrung from the city and its inhabitants prices greatly beyond the highest limits of its charter. That by these practices it has become very rich, being worth over a million of dollars.

It is not surprising that complainant, who is the large beneficiary of this rich spoil and fat monopoly, should start with alarm at the prospect of honest competition, and seek by every plausible pretext and every artifice to retain its splendid monopoly.

The company is most willing to do all that can be done to second his efforts.

It applied without success to the State courts, and then at the bidding of the complainant it assumed an attitude of apparent hostility to afford him a pretext to get a footing in this honorable court, and to take his chances here.

The officer who swore to the bill in the State courts, swears to this; and for his fidelity is made attorney, in fact, with the most extensive discretion; and yet he and the other officers of the company are held out, as in a state of antagonism, in order to give jurisdiction. To consent to assume such an attitude against their anxious wish and desire, and perfect readiness to do what complainant wishes, is evidence that the hostility between complainant and the company is pretended and not real; and so defendant charges the fact to be.

Defendant submits that the injunction should be dissolved, for the reason that complainant stood by and permitted defendant to
35 expend, at least $—— before proceedings were applied for to stay the progress of their work. Said company waited until the work of defendant was fairly launched and much money had been

expended, and then undertook the assertion of its rights at a stage when it will be most damaging to defendant's enterprise, and if successful, will paralize defendant's credit. Such a course is against equity and good conscience, and courts of equity refuse to interfere, under such circumstances, by a provisional injunction.

Defendant shows and charges, that complainant has threatened to crush defendant's enterprise at all hazards; has threatened to undersell, misrepresented the standing and credit of defendant's company, and boasted that the wealth piled into his coffers by this monopoly would sustain him through the contest and bring him out triumphant.

That he has applied to the board of mayor and aldermen, and promised to reduce his rate of prices, and to reform those abuses by which his company has defied the city and extorted money from the inhabitants. His company does not scruple to promise reformation, and launch its threats at defendant in the journals of the city, in at advertisement to the public. This advertisement is made part of this answer, without admitting the truth of its statement, as exhibit "B," in order that the honorable court may see a confession therein of some of the charges made by defendant.

The only relief prayed for on final hearing is a perpetual injunction. Defendant respectfully submits that where such is the case, it is utterly repugnant to the practice of the United States Court and of the English Chancery Court, from which the practice and rules in this regard were mainly derived, to grant a preliminary or provisional injunction; but the question is reserved until the final hearing, unless the grant of such preliminary injunction is necessary in order to prevent irreparable injury to the applicant; and such an allegation is not even made in complainant's bill, as defendant understands it. and if it was so made, the same would be utterly untrue, as the very nature of the case must show. Defendant does in fact allege and charge no irreparable injury, and in fact no injury at all can accrue to complainant or his company, by the prosecution of the work of defendant's company, nor by any subscription of stock which the city could make to defendant's company; but on the contrary, it is alleged and stated as a fact that if the complainant has any equity in the bill on which he can ultimately succeed, he cannot and will not be injured by the prosecution of the work of defendant's company. While a delay occasioned to defendant's company by a preliminary injunction, will have a tendency to greatly injure that credit on which all such enterprises must depend for raising the means with which to conduct such public works, even if they succeed ultimately, of which they have no doubt.

Having fully answered herein, defendant prays for dissolution of injunction to be herein dismissed with costs.

KORTRECHT & CRAFT.
BROWN, GANTT & WADDELL.

36 STATE OF TENNESSEE, *Shelby County*:

This day came Garland P. Ware, one of the stockholders in the Memphis Gayoso Gas Company, secretary of the same, and

made oath in due form of law, that the facts contained in his answer, so far as made from his knowledge, are true, and so far as made from the information of others, he believes them to be true.

(Signed) G. P. WARE.

Subscribed and sworn to before me, October 16, 1867.

(Signed) A. S. MITCHELL,
Clerk U. S. Circuit Court, District of West Tennessee.

Exhibit "B."

In answer of defendant in the case of Thompson Dean *vs.* Memphis Gayoso Gas Company *et al.*

Notice to gas consumers.—In compliance with a pledges made in their communication of February last to the honorable mayor and board of aldermen, the Memphis Gaslight Company have determined to reduce the price of their sales of gas supplied on and after the first day of December next to the lowest rate then deemed possible, allowing a small profit on the capital invested, and pledge themselves that the price then established shall range among the lowest rates charged in other southern and southwestern cities. Their apparatus lately, at great expense, improved and extended, enables them to supply as pure, strong, and brilliant gaslight as that supplied anywhere in the United States. With reference to a much threatened opposition in business, which they do not deem probable, the company hereby give notice to their patrons and the public that in case of an actual competition, they will supply their demands at one-third, or less than one-third the rates established by such competitors. Their works were constructed with a view of remunerating the owners for their investments, as well as for the public convenience. Notwithstanding such intention, they will ever sell or furnish light at a mere fraction of the prices asked by any competing or opposing company.

JAMES M. WILLIAMSON,
President.

In the United States Circuit Court for the distict of West Tennessee.

THOMPSON DEAN
vs.
MAYOR AND ALDERMEN OF THE CITY OF Memphis *et al.*

The mayor and aldermen of the city of Memphis, for answer to complainant's bill, adopts the answer of their co-defendants,
37 the Memphis Gayoso Gas Company, in such parts as are material for them to answer.

(Signed) R. J. MORGAN,
Solicitor for the City of Memphis.

This is accepted as the answer of the mayor and aldermen of Memphis, the oath and corporate seal being waived.

October 16, 1867.

(Signed) McREA.

THOMPSON DEAN
vs.
THE MEMPHIS GASLIGHT COMPANY, The Memphis Gayoso Gas Company, The Board of Mayor and Aldermen of Memphis.

The replication of Thompson Dean, complainant, to the answer of the Memphis Gayoso Gas Company, and the Board of Mayor and Aldermen of Memphis, defendants:

Repliant saving and reserving for himself all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants, for replication thereunto saith, that he doth and will aver, maintain and prove his said bill to be true, certain and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain and prove, as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

McRAE & HUMES,
Solicitors for Repliant.

Colonel D. R. McRAE and General W. T. C. HUMES, Counsels for Thompson Dean.

You will take notice, that we have to-day, in open court, moved for a dissolution of the injunction granted by the Honorable Connelly F. Trigg, sitting in the United States circuit, for the district of West Tennessee, in the case of Thompson Dean against the Mayor and Aldermen of the city of Memphis et al, and on to-morrow, October seventeenth, 1867, will ask the court to act on said motion. The answer of the defendants, the Mayor and Aldermen, and the Memphis Gayoso Gas Company, having been filed in the said cause. Said motion is made or on the coming in of the answer to the merits.

KORTRECHT & CRAFT,
GANTT & WADDELL,
R. J. MORGAN,
and T. W. BROWN.
For Defendants.

October 16, 1867.

Endorsed: service acknowledged.

McRAE.

Injunction Bill.

38 THOMPSON DEAN
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS, The Memphis Gayoso Gas Company, The Memphis Gaslight Company.

This day appear the complainant and the defendants, by their counsel, and thereupon by consent of all parties this cause was set for hearing on bill and exhibits, and on the answer of the Memphis Gayoso Gas Company and exhibits, and the answer of the Mayor and Aldermen of the city of Memphis who, by consent of complaint, adopted the answer of the Memphis Gayoso Gas Company as their answer in this cause; and the said cause coming on for hearing, the same was heard, and the court being sufficiently advised, it is considered that the complainant is entitled to the relief prayed for. Wherefore it is ordered and decreed that the injunctions and restraining orders heretofore granted on the preliminary application of the complainant herein respectively against the Board of Mayor and Aldermen of the city of Memphis, and the Memphis Gayoso Gas Company be and are hereby made perpetual; and it is further ordered and decreed that the complainant recover of the defendants, the Board of Mayor and Aldermen of the city of Memphis and of the Memphis Gayoso Gas Company, their costs in this behalf expended, for which execution may issue. And thereupon came the defendants, the Board of Mayor and Aldermen of the city of Memphis and the Memphis Gayoso Gas Company, and prayed an appeal to the next term of the Supreme Court of the United States to be holden in the city of Washington, District of Columbia, on the first Monday in December next, which prayer is accordingly granted, on the said defendants praying the appeal aforesaid, giving bond with good security, to be approved by the clerk, in the sum of one thousand dollars, conditioned according to law, for the payment of the costs of said appeal, within five days from the entry of this decree and to be filed with the clerk; and it is further agreed by the parties in open court and so entered of record, that the value of the matter in controversy being the franchise asserted by the complainant and that claimed by the defendants appealing, each exceeds the sum of five thousand dollars; and it is further here agreed in open court by the parties, complainant and defendants, that all the acts of the legislature of Tennessee refered to, either in the bill or answer, shall be considered as part of the record, and may be, on the appeal granted, exhibited to the Supreme Court, if not copied into the record, by the authenticated publications thereof by the State of Tennessee.

39 Know all men by these presents, that we, the Memphis Gayoso Gas Company, and the Board of Mayor and Aldermen of the city of Memphis, principals, and Geo. Gantt & E. W. Wickersham, sureties, are held and firmly bound unto Thompson Dean in the sum of one thousand dollars, for the payment of which we hereby bind ourselves, &c., &c.

The condition of the above obligation is such, that whereas the above-bounden principals, did, on the 17th day of October inst., pray an appeal to the Supreme Court of the United States from a decree rendered in the United States Circuit Court for the district of West Tennessee, in the case of Thompson Dean *vs.* The Memphis Gayoso Gas Company and the Board of Mayor and Aldermen of the city of Memphis, and said appeal was granted: Now, if the said principals, the Memphis Gayoso Gas Company and the Board of Mayor and Aldermen shall pay and satisfy all costs that may accrue to them on said appeal, the above obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 21st day of October, 1867.

[SEAL.] W. O. LOFLAND, *Mayor.*
G. P. WARE, *Sec. M. G. Gas Co.*
GEO. GANTT.
E. E. WICKERSHAM.

Acknowledged and approved:

[SEAL.] A. S. MITCHELL, *Clerk.*

40 UNITED STATES OF AMERICA, *District of West Tennessee:*

I, Abram S. Mitchell, clerk of the United States Circuit Court for the district of West Tennessee, do hereby certify that the foregoing thirty-eight pages of print and two pages of manuscript, (including this,) contain a full and true transcript of the record and proceedings in the suit of Thompson Dean against the Mayor and Aldermen of the city of Memphis, the Memphis Gayoso Gas Company, and the Memphis Gaslight Company, as the same remain of record in my office.

Witness my hand and the seal of said court at office in the city of Memphis, this 21st day of November, A. D. 1867.

[SEAL.] A. S. MITCHELL, *Clerk.*

Injunction bill.

41 THOMPSON DEAN
vs.
THE MEMPHIS GAYOSO GAS COMPANY *et als.*

Bill of costs.

Clerk issuing summons and seals, 1,20; certificate, 15; cost bond, 30; filing, 10; certificate, 15; filing bill, 10; certificate, 15; filing 2 exhibits to bill, 20; 2 certificates, 30; filing plea in abatement, 10; certificate, 15; order overruling plea, 15; 2 orders for injunctions, 30; 2 orders for bonds, 30; 2 injunction bonds, 90; filing 2 bonds, 20; 2 certificates, 30; issuing 2 injunctions and seals, 2 40; 2 certificates, 30; filing 2 injunctions, 20; 2 certificates, 30; filing 2 answers, 20; 2 certificates, 30; filing exhibit to answer, 10; certificate, 15; filing 14 other papers in the cause, 1 40; 14 certificates, 2 10;

administering 2 oaths, 20; 2 jurats, 30; final decree, 50; order for costs, 15; order for execution, 15; order for appeal, 15; order for bond, 15; order giving time, 15; appeal bond, 45; filing, 10; certificate, 15; taking 14 acknowledgments to bonds, 3 50; making dockets, indexes, &c., 30; copying and filing costs, 40; certificate of filing, 15	$22 00
This record, certificate and seal	20 50
	42 50
McRae & Humes, solicitors, docket fee	20 00
	$62 50

Rec'd payment of above costs.

A. S. MITCHELL, *Clerk.*

Supreme Court of the United States.

No. 155.

THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS AND THE MEMPHIS GAYOSO GAS COMPANY, APPELLANTS,

vs.

THOMPSON DEAN.

BRIEF FOR THE DEFENDANTS IN ERROR.

FACTS.

This is an appeal from a decree of the circuit court for the district of West Tennessee.

Thompson Dean, a citizen of the State of New York, filed his bill in the circuit court for the district of West Tennessee against the Mayor and aldermen of Memphis, the Memphis Gayoso Gas Company, and the Memphis Gas-light Company.

He alleged that he was a large and controlling stockholder in the Memphis Gas-light Company; that said company had been duly incorporated and organized under the laws of Tennessee, and had its business location at Memphis, and had by its charter an exclusive right to vend gas by means of public works to the corporate authorities of the city, and to the inhabitants, and had the exclusive right to the use of the streets, lanes, alleys, and squares for that purpose; that the defendant, The Memphis Gayoso Gas Company, under the pretence of a charter for that purpose, was using the streets to lay its pipes, &c., and was claiming the right and was preparing to assert it, to sell gas transported by means of pipes through the streets to the

inhabitants, to the great damage of the franchise of the complainant. Complainant also alleged that the Memphis Gas-light Company, of which he was a stockholder, had made a contract with the city of Memphis to supply, exclusively, its public lights, and as a consideration of this contract, that the Board of Mayor and Aldermen had granted to the said company the use of the streets, the city being the owner of the soil. Nevertheless, that, in fraud of this contract, the board had passed a resolution to subscribe for stock in the rival company, and thereby to aid its effort to compete with complainant's company, and that there was no authority in the charter of said city for this purpose, and the act was unconstitutional. Complainant further alleged that he had applied to the officers and directors of his company to institute proceedings to prevent the contemplated wrong and injury, both against The Memphis Gayoso Gas Company and *against the Board of Mayor and Aldermen*, which the said directors declined to do, alleging that they had already filed a bill against the said company, and obtained a partial injunction, but were not disposed to push the matter against the board. And thereupon the complainant filed this bill.

Record, 11 to 18.

To this bill the defendants, The Memphis Gayoso Gas Company and the Board of Mayor and Aldermen, now the appellants, plead to the jurisdiction.

Record, 19 to 28.

The nature of the plea is fully set forth in the brief of the appellants.

Brief, page 3.

As are the further facts in the case.

Brief, 4–5.

ARGUMENT.

There is no force in the first proposition of the plea—

"That while complainant below was a non-resident, his company was a corporation resident in Memphis."

This is answered by the allegation that he applied to his company to interpose in his behalf, and it declined.

The second proposition, denying the allegation that the "Memphis Gas-light Company had refused to take the necessary legal steps to assert and maintain the rights of complainant," is answered by the remaining portion of the plea, wherein it appears that the suit begun in the chancery court of Memphis by said company was only brought against the Memphis Gayoso Gas Company. That bill only set up the claim of the Memphis Gas-light Company to the exclusive privilege, and only asked an injunction to stop the progress on the streets of the rival company.

It also appears by the allegation of our bill, admitted by the plea, that the action of the other defendant—the Board of Mayor and Aldermen—was taken after the disposition of the other cause in the chancery court, and was a new grievance.

It is alleged in this bill that without reference to any exclusive privilege in the complainant's company, the action of the Board of Mayor and Aldermen is a fraud upon the contract made by them with complainant's company.

See Contract; Record, 25, 26, 27.

That the action of the board gives strength and credit to the other defendant, which enables it to prosecute its wrongs.

And the court below was of this opinion, and on inspection of the record of the other suit, and on the argument of the bill and plea, overruled this plea. The facts of the case bring it strictly within the principles of—

Dodge vs. Woolsey, 18 How., 331.

Bronson vs. La Crosse, 2 Wall., 283.

The third proposition of the plea was intended to be a plea of a prior suit depending for the same cause of action between the same parties.

Perhaps the complainant should have asked a reference to the master to report upon the truth of the plea, and it may be said (though no such claim is made in the brief of the appellant) that on its being set down for argument without such reference, the plea should have been allowed.

2 Dan. Ch. Pr., 726, 1 Am. Ed.

If this rule of practice prevails in the United States courts, it was waived in this case because—

1st. On the failure of the complainant to move the reference, *there was no motion to dismiss.*

2d. The record of the depending suit was presented at the argument by the appellant, and the decision of the court asked on its inspection.

3d. The Court, on such inspection, found the fact against the plea and disallowed it, *and there was no appeal or exception*, but the appellants proceeded to answer and try the cause at the hearing.

2 Dan. Ch. Pr., 726.

Lucas vs. Holder, 1 Eq. Ca Ab., 4.

9 Paige, 292, 293.

But the appellee is relieved against the force of the rule, because the plea is defective, in which case it may be set down for argument.

2 Dan. Ch. Pr., 726.

1 Story Eq. Pl., Pars. 743, 744, and references.

The plea is defective—

1st. In that it sets out no time when the other suit commenced.

See Danl. Ch. Pr., 726.

3 Atk., 587.

1 Story Eq. Pl., Par. 737.

Plea, Record, 18.

2d. Nor that it was depending at the commencement of this suit.

3d. Nor does it state any process or appearance, or issue joined of some character.

Story, 737.

Ld. Redes., 247.

2d My. & Cr., 602.

4th. It does not set forth the character and objects of the former suit, or the relief prayed for.

Harring Ch., 219.

5th. The plea is to the jurisdiction when it should have been to the bill.

Story, 735.

6th. It is not certified by counsel. (Rule 31.)

This brings us to the important question. The charter of the Memphis Gas-light Company was granted in November, 1851.

Its powers and privileges, as also its obligations, are imported from the act of the Legislature of Tennessee incorporating the Nashville Gas-light Company, passed at the session of 1849, and embraced from the 2d to the 12th sections of said act inclusive, excepting the 10th.

Record, 14, 15.

There is no effort here to unsettle or modify the rules for the construction of grants adopted by this court. These rules are understood to be—

1. That an act of incorporation is a contract between the State and the stockholders, which the State may not subsequently impair.

72 Ecl. R. 220 85-6-67- 24 A 84 12

2. That all contracts are to be construed to accomplish the intent of the parties, and a liberal and fair construction will be given to the words employed, and no strained or artificial construction will be applied.

3. That charters are to be construed most favorably to the State, and while due effect will be given to the obvious import of words, nothing passes in public grant by implication.

The Binghampton case, 3 Wall., 74.

The exclusive privilege is derived—

1st. From the 3d section of the act to authorize the establishment of the Nashville Gas-light Company, in connection with the 4th section of the same, and the 5th :

"SEC. 3. It shall be the duty of said company to establish, within three years from the 1st of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas-light as may be required.

"SEC. 4. To enable said company to establish said works, they are hereby authorized and empowered to lay down pipes, and extend conductors and other apparatus, through all or any of the streets, lanes, or alleys of the city of Nashville.

"SEC. 5. That said company shall have the privilege of erecting, establishing and constructing gas-works, and manufacturing and vending gas by means of public works, for fifty years," &c.

Record, 12.

In the 3d section, the *duty* of supplying the corporate authorities and the inhabitants is made a condition of the charter; is distinctly

imposed and assumed. Without this no such obligation would have rested on the company; there would have been no *jus publicum* incident to the grant.

Unlike grantees of ferries, markets, bridges and roads, who are obliged to serve all applicants, this grantee would have been a *mere private* vender of gas.

30th Conn. R.

45 Barb., 137.

This duty, then, is part and parcel of the contract, and is reciprocal; on the part of the grantee, that it will expend the capital to construct and maintain a capacity to supply all; and, on the part of the grantor, that it may supply all, free from injurious competition by any other vendor, "*by means of public works*," through the use of the streets.

In other words, the privilege is co-extensive with the duty.

Qui sentit onus, sentire debet et commodum.

This principle is in strict harmony with all that was said in the Charles River Bridge case.

See argument of Mr. Dutton, 11 Peters, 455.

Of Mr. Greenleaf, 464.

Of Mr. Davis, 504.

Of Justice McLean, 562.

Of Justice Story, 629.

The decision of the court is not only not adverse to this principle, but sustains it, for, says the Chief Justice—

"There is no exclusive privilege given to them over the waters of Charles river, above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one."

But suppose the charter of the Charles River Company had fixed upon it as a duty, to pass all the travel between Charlestown and Boston, to keep a bridge or bridges of sufficient capacity for that purpose, and to enable them to do so they had been privileged to use the landings along the river on which to rest the abutments of necessary bridges.

Can it be doubted that the case would have presented a totally different aspect? It would in that case have been impossible to authorize another bridge without "*impairing some of the enumerated franchises.*"

11 Peters, 548.

Yet our case is stronger, because in that case there was a *jus publicum* as incident to the grant, that the company would pass all comers as far as their bridge could accommodate, and they would have been liable for a refusal. But here no one could have claimed the right to be supplied with light, except for the obligation imposed in the charter, unless as a reciprocal of the exclusive privilege. *A fortiori*, therefore, where the charge is specific, ought the privilege to be correlative.

The grant of the streets is as comprehensive as the duty required.

Record, 11, 12.

And section 5 provides for a continuance of the duty and its discharge for fifty years.

Record, 11, 12.

This idea of a corresponding duty and privilege is prominent in the case of the Norwich Gas-light Company *vs.* Norwich Gas Company.

25 Conn. R., 20, 36.

It will be seen that the Connecticut court held that no grant passed to the Norwich Gas-light Company as assignees of Treadway under the resolution of the Common Council, because, 1st, the city did not own the streets ; 2d, there was no *deed* conveying the interest.

Second, That no exclusive privilege was acquired by its original charter, because the words neither expressed it, nor could it be derived from their obvious import.

Third. Nor by the amendment of 1855, because "the grant appeared to be made without consideration," and was, therefore, a monopoly.

25 Conn. R., 30 to 37, included.

The fallacy of the argument in that case is that the reasoning is not run out to its logical conclusion.

The learned judge was evidently of opinion that there could be no exclusive privilege without the obligation to furnish, "for," said he, "if the right to tolls cannot be granted except upon the terms of an adequate consideration in the facilities furnished to the public, ought the public, or any portion of it, to be deprived of the ordinary means of obtaining gas, *unless the parties who claim an exclusive right to use those means are under an obligation to furnish it.*"

See page 37.

The conclusion is, that if such obligation exists the claim to the exclusive right is well founded, not because it may be expressed, but because it is the "*obvious import*" of the obligation.

But the learned judge failed to see the "obvious import," which, in the case then under consideration, was, that the exclusive right being expressly given, the obligation to furnish all was necessarily inferred.

In this view of that case, there being a charter from the legislature in a matter not of common right, on a consideration, there was no room in which to locate a "*monopoly*."

30 Barb.

In none of the cases where the Gas Company is held not to be obliged to furnish all was there any grant of an exclusive right *expressed*. On the contrary, the view which is here submitted has the direct sanction of a learned court of one of the States, after mature deliberation, on the very question now presented.

6 Wisconsin R., 539 to 548.

Testing the intent of the parties by these provisions of the grant, it will be seen how worthless the franchise would have been if the right were reserved to charter a rival.

For example: At the inauguration of the franchise the town was small, the inhabitants few, and compactly located; as it increases in population its inhabited localities are scattered. Now, the company, burdened with the duty of supplying all who require, would be obliged to lay its pipes through whatever profitless space there might be to supply a single want; while the more favored rival, not being incumbered with this duty, could select its customers, and afford to supply cheaper, and thus the very *jus publicum* whose presence in our grant takes away any feature of a monopoly, is destructive of its value, while its absence in the other is a source of value, and the pure monopoly becomes the legislative favorite.

It is a mistake to suppose that our agreement implies "that the inhabitants of the city may not manufacture their own gas, or be supplied by their neighbors," provided they are not supplied through pipes laid in the streets by means of public works.

Our duty is to supply all who require to be supplied *by this means*, and the privilege is only coextensive.

95 2 Cd R 239
3 Dutch 247
30 Conn 524
45 Barb 137

Again: The intent of the parties is seen in the regulation of prices.
Section 5, Record, 12.

The exclusive right is evidenced also in the contract of the city.
Record, 8–9.

Another help in arriving at a correct knowledge of the intention of the legislature, and in giving a proper construction to the grant, may be found in the 10th section of the act of incorporation.
Record, 13.

This section is not imported into our charter, but its absence does not at all diminish the privileges of the grant, but is evidence of what those privileges are.

Statutes *in pari materia*, though repealed, may be resorted to to aid in the construction.

9 Barb., 161.

So of a repealed proviso.
3 Wall., 495–509.

1st. Why should the legislature authorize the city to buy out the corporation at the end of twenty years, and compel the latter to sell, unless it were contemplated that there should be no rival.

2d. Is it likely that the corporation would have consented to this condition by which its rights and interests, as also its lands and buildings, were to be estimated for forced sale if it had been understood that there was a reservation under which rivals and competitors might be introduced, whose introduction would materially depreciate the property to be sold.

3d. Would it be creditable to the State to have held this reservation secret and implied.

Next. The 7th and 11th sections of the charter, and the 3d section of the contract affords still further evidence of the meaning of the parties.

Record, 12, 13, 9.

Again. This grant to the appellants is void, because contrary to the constitution of Tennessee.

Bill of Rights, secs. 8–21.

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Record, 12, 13, 9.

Again. This grant to the appellants is void, because contrary to the constitution of Tennessee.
Bill of Rights, secs. 8–21.

Because it proposes to take private property not by the law of the land, or for public use with due compensation.

This necessitates the inquiry as to the interest in the streets acquired under our charter, and by the contract with the city.

It is not a mere license, but a property; a right and interest in the soil itself, irrevocable.

5 B. & C., 468, 470, 471-'2. 19 Ed L + Eq 639
7 E. L. & Eq., 376, 381. 5 B + C 221
14 E. L. & Eq., 94, 101.
31 E. L. & Eq., 503, 514.
2 Rhode Island, 15. 11 Law Journ 45 303

If, then, it be an easement, or property in the soil, it covers with it the right to be undisturbed in all the incidents of the occupation. *Cujus est solum ejus est usque ad cœlum.*

Broome's Legal Maxims, 172–175.
31 E. L. and Eq., 503.
31 Barb. Sup. Ct., 548.

This principle is fully illustrated in—
24 Eng. L. and Eq., 513–517.

It is upon this principle that municipal corporations not owning the soil of the streets, but merely the easement of the way, have the right to license the use of the soil below.

This is not an exercise of the eminent domain.

1st. There is no provision in the charter for compensation, nor any purpose to make any.

Sedgw. on Const. Law, 525–528.
6 Wis. R, 605.

2d. The work is not one of such internal improvement as to fall under the general law.

Tennessee Code, sec. 1325.

3d. The eminent domain cannot be so exercised as to take a franchise for a precisely similar use.

23 Pick., 393.
3 Paige, 45.
6 How., 537.
7 Foster, 183.
3 Ind., 464.

4th. Because there is no public use served by the appellants' charter.

It is contended that it derives its rights and bears its obligations from the same charter of "Nashville Gas-light Company."

See Charter of Appellants, Record, 17, sec. 8.

For Charter of Edgefield Gas-light Company, Record, 17, sec. 5.

It will be seen that, while the Edgefield Company is subject to the liabilities of the Nashville Company, the appellants take the powers, rights, and privileges of the Edgefield Company, but is not subject to its liabilities, and so the answer admits.

Record, 31.

If so, there is no obligation to sell; no *jus publicum*, and of consequence no *public use* to which to apply the eminent domain. Furthermore, the appellant has no authority by its charter to locate in Memphis. It takes only the powers and privileges of the Edgefield Company, and is confined to its location.

Act of Incorporation, sec. 3.

Record, 16.

This is not helped by the subsequent act of the legislature of December, 1866.

Record, 17.

Nor by the statement in the answer that this act was passed "with full knowledge by the legislature that it claimed to establish gas works in the city of Memphis." This is an affirmative allegation, not responsive to the bill, and is not evidence of the fact.

Record, 32.

Upon the face of the act there is evidence to the contrary.

Record, 17.

The acts of the appellant are therefore a public and private nuisance, which an injunction on the application of an individual will restrain.

9 Wh., 738.

1 McLean, 337.

6 John Ch. R., 439.

45 ~~Bost.~~, 74–84. Bank

18 N. Y. R., 160.

7 Ark 35

2 Bees 302

1 2 Law Times 1 3. 14

The proposed action of the city of Memphis is in fraud of their contract and ought to be restrained.

Record, 8–9.

The city has no authority to issue such bonds.

The authority is claimed under the act of 1866–7, in these words:

"They shall also have power, for the purpose of making any public improvement that may be deemed necessary for the city, or of acquiring any property for the public use of the city, to issue the bonds of the city."

The power of the city is limited by the constitution.

Art. 2, sec. 29.

This is not such a public improvement or corporate purpose as is intended in the act or in the constitution.

1st. There is no obligation to serve the public.

2d. It is a purely speculative enterprise.

1 Sneed, 715.

3d. It would impose a tax upon the respondent in violation of the contract.

The appellants contend that the cause having been set for hearing on bill, answers, and exhibits, amounts to a withdrawal of the replication, and takes the answer for true upon the facts. Such would be so if the hearing were on bill and answer, but the exhibits, not part of the answer or bill, being proofs, are only let in by the replication.

2 Daniel, 967.

In such case the replication is mere matter of form, and if not put in, the court would suffer it *nunc pro tunc*.

3 Blatchford, 115.

1 Bibb, 277.

3 John Ch., 363.

1 Paige, 490.

Indeed, a replication can only be withdrawn on motion.

17 Ves., 130.

The answers make no allegation of any acquiescence on the part of this respondent, if there were any force in its allegations against his corporation.

D. K. McRAE,
For Respondent.

Supreme Court of the United States.

No. 155.

The Mayor and Aldermen of the City of Memphis and the Memphis Gayoso Gas Co., Appellants,

vs.

Thompson ~~Thomas~~ Dean.

BRIEF FOR THE PLAINTIFFS IN ERROR.

FRED. P. STANTON, Counsel.

Supreme Court of the United States.

THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS AND THE MEMPHIS GAYOSO GAS COMPANY, APPELLANTS,
vs.
~~THOMAS~~ Thompson DEAN.
No. 155.

BRIEF FOR THE PLAINTIFFS IN ERROR.

This is an appeal from a decree of the Circuit Court of the United States, for the Western District of Tennessee.

The defendant in error filed his bill in the court below, alleging that he is a citizen of the State of New York and a large stockholder in the Memphis Gas-light Company, a corporation chartered by the State of Tennessee. The acts of incorporation are set forth in the bill; and the organization of the company under its charter, as well as the establishment of works sufficient to supply the public authorities and private citizens of Memphis with such gas-light as might be required, are stated in detail.

The bill further shows a contract made with the mayor and aldermen of Memphis, by which the city authorities conferred on the company the exclusive privilege for twenty years of lighting the city of Memphis with such public lamps as might be agreed upon between the parties, and also the right (not exclusive) of laying down pipes and conductors in the streets and alleys of the city.

The bill then recites the laws by which the Memphis Gayoso Gas Company was incorporated in May, 1866, and states the fact that it has organized under its charter, and, claiming the right to do so, is actually laying down its pipes

and preparing to manufacture gas in the city of Memphis. The bill also charges that the Gayoso Gas Company has laid its service pipes across both the mains and service pipes of the Memphis Gas-light Company, and that "*it is claiming the right to manufacture gas by public works, and sell the same to the inhabitants of Memphis in competition with the said Gas-light Company.*"

The bill further complains that the other defendants, the mayor and aldermen of Memphis, have passed an ordinance submitting to the voters of the city the question of subscribing $250,000 to the stock of the Gayoso Gas Company, and that the influence of the city authorities will probably induce the citizens to sanction the proposed subscription.

The bill insists that neither the Memphis Gayoso Gas Company nor the city authorities have the right by law to do the acts complained of, and expressly claims that the Memphis Gas-light Company "*has the exclusive privilege of supplying the corporate authorities and inhabitants with such public and private gas-lights as might be required, which grant the General Assembly cannot constitutionally revoke.*"

Complaint is also made in the bill of inconvenience and injury to the Memphis Gas-light Company, arising from the manner of laying the pipes of the new company, above and across, or even contiguous to those of the old company.

Finally, the bill complains that the Memphis Gas-light Company, of which complainant is, perhaps, the largest stockholder, declines, at his request, to proceed in the courts against the corporate authorities of Memphis, and against the rival company, alleging that they have already filed a bill in the Chancery Court of Memphis against the Gayoso Gas Company, and obtained a partial injunction, but that they refuse to proceed further.

The bill prays an injunction restraining the city authorities from holding the election intended, or from subscribing to the stock, or issuing bonds, &c., and enjoining the Gayoso Gas Company from laying pipes in the streets of Memphis, and from manufacturing gas and selling the same to the inhabitants.

To this bill the Gayoso Gas Company filed pleas to the following effect:

1st. That while the complainant below was a non-resident stockholder, his company was a corporation resident in Tennessee.

2d. That it was not true, as alleged, that the Memphis Gas-light Company had refused to take the necessary legal steps to assert and maintain the rights of complainant, but that, on the contrary, they had filed a bill in the Chancery Court of Memphis, wherein the same relief was sought as in the present bill, &c., &c.

3d. That the said cause instituted in the Chancery Court of Memphis was then still pending; that the same identical matters were presented for adjudication as in the present bill; that the said court had full and ample jurisdiction; that a partial injunction had been obtained, and that the Gayoso Gas Company was still bound by the said partial injunction, and was still subject to the further order of the said Chancery Court in the premises, &c., &c. The record of the prior suit was tendered with the pleas. (Pages 19 to 28.)

The cause was argued "on the bill and pleadings filed;" and the Court overruled the pleas, and by an interlocutory decree granted the injunction to the full extent prayed for, both against the mayor and aldermen of Memphis, and against the Gayoso Gas Company. (See Record, p. 28.)

The Gayoso Gas Company then filed their answer, admitting the facts stated by the bill as to the incorporation of the respective companies and their organization under the laws. But the answer denies that the works established by the Memphis Gas-light Company are sufficient for the wants of the city. The answer admits the contract between the Memphis Gas-light Company and the city authorities, but denies that said contract gives any exclusive privilege except as to the public lamps, and appeals to the instrument itself for the truth of this construction. The power of the city to grant any such exclusive right, even if it had proposed to do so, is expressly denied.

The claim set up in the bill, that the legislature of Tennessee had ratified the corporate acts of the Memphis Gas-light Company, is denied, except in so far as such ratification may be inferred from laws authorizing an increase of the capital stock of the company; and the answer alleges that the said legislature, with full knowledge that the Memphis Gayoso Gas Company claimed the right to erect and establish gas-works in Memphis, also authorized an increase of its stock to $1,000,000, by an act passed on the 4th December, 1866.

The answer denies that in laying the pipes of the new company they have caused any injury or inconvenience to the old company. It admits that the new company is preparing to sell gas in competition with the old company, and claims the right to do so under the law, denying that anything in the charters and laws of the State, or in the contract with the city authorities, confers upon the old company the exclusive right to furnish gas to the inhabitants.

The answer further denies that the Memphis Gas Company have complied with the terms of their charter; but alleges, on the contrary, that they have furnished inferior gas at exorbitant prices; have refused to lay pipes in places where they were needed; have not kept pace with the improvements of the city, and have systematically disregarded the limits of price fixed in their charter, making illegal exactions upon the citizens.

The answer also denies the allegation of the bill that the mayor and aldermen of Memphis have not the right to take the vote and make the subscription proposed, but claims that the said acts of the city authorities are legal.

The answer also refers to the proceedings instituted in the Chancery Court above recited, and alleges that the Memphis Gas-light Company is precluded from claiming the relief asked in the bill, because they stood by while the Gayoso Gas Company were making large expenditures, and, with full knowledge that they were so doing, acquiesced in their proceedings, and took no steps to arrest them until after they had gone so far in their enterprise that to stop them would necessarily entail a ruinous loss.

The mayor and aldermen of Memphis, by consent of parties, adopt the answer of the Gayoso Gas Company, but the Memphis Gas-light Company have made no answer at all.

The complainant below, Thompson Dean, filed his replication to the answers of the Gayoso Gas Company and the mayor and aldermen of Memphis. There is no order taking the bill *pro confesso* against the Gas-light Company.

"By consent of all parties," the cause was set for hearing on the bill and exhibits, and on the answer of the Gayoso Gas Company, adopted by the mayor and aldermen, and exhibits. The Court decreed a perpetual injunction, as in the preliminary order; thus annihilating the existence of the Gayoso Gas Company, if the decree shall be sustained. (See Record, p. 38.)

From this decree, the mayor and aldermen and the Gayoso Gas Company appeal to this Court, and all the parties agreed that the acts of the legislature of Tennessee, referred to in the bill or answer, shall be considered a part of the record. These acts are all in the printed record, from p. 11 to 18.

ARGUMENT.

I

The first question presented in this case arises under the pleas found on the 18th page of the record.

The second plea denies the allegation of the bill, that the Memphis Gas-light Company had refused to take the necessary steps to assert and maintain the rights of its stockholders; on the contrary, it shows the commencment of a suit in the Chancery Court of Memphis for that purpose, and tenders a copy of the record in proof of it. But this fact is not only shown by the plea and the record exhibited, but it is equally admitted by the bill itself, in its "Exhibit B," pp. 10, 11. In this exhibit the President of the Gas-light Company

informs the complainant that the bill had been filed in the Chancery Court, and a partial injunction obtained.

Under the circumstances existing at the time, as thus shown by the pleadings, Thompson Dean, as one of the stockholders of the Memphis Gas-light Company, had no right to file his bill in the court below, in order to protect the interests of the Company. He could only do so in case the Company refused to do it. Dodge *vs.* Woolsey, 18 How., 344, 345.

From the reasoning of this Court in the case cited, it is plain that if suit by the Commercial Branch Bank had been pending at the time against Dodge in the State courts, Woolsey would not have been allowed to file his bill for the same relief in the courts of the United States.

The third plea relies upon the actual pendency of the prior suit in the Chancery Court of Memphis. The preliminary injunction granted by the Chancellor was in the following words:

"Upon complainant giving bond with security in the sum of $5,000, the clerk and master will issue the writ of injunction restraining defendants from laying their gas pipes above those of complainant, or so near to them as to cause injury to them.

"I decline ordering an injunction restraining defendants from proceeding with their gas-works, as I do not see that any exclusive privilege has been conferred on complainant.

"WM. M. SMITH.
"*Chancellor.*

"September 12, 1867."

See Record, p. 25. This injunction was in full operation when Dean filed his bill in the court below; and it is evident that he went into the Circuit Court of the United States in order to evade the jurisdiction of the local court—to appeal from the decision of Chancellor Smith, who had refused to recognize the monopoly claimed by the Gas-light Company. He made the mayor and aldermen parties to the proceeding, probably because he supposed that would enable him to avoid the plea of a prior action pending. But the fact of additional parties being included in the second suit does not alter the

application of the principle. The true test is the identity of the matters in issue—the rights claimed, and the relief sought. In both cases, the foundation of the proceeding is the same. Both rely upon the monopoly claimed by the elder Gas Company—the exclusive right said to be granted in their charter, to make and sell gas in Memphis. The absurd proceeding against the city authorities depends wholly on this claim; for unless the exclusive right claimed can be established, there is no pretence of any right in a citizen of New York to interfere with the proposed acts of the mayor and aldermen. If that exclusive right can be established, then the injunction against the city would be wholly useless, inasmuch as an injunction against the new company would effectually suspend their work, in spite of the people or public authorities of Memphis.

Story's Equity Pl., secs. 736 to 745.
Cooper's Eq. Pl., 273.
Mitford's Ch. Pl., 248.

"Where one part owner of a ship filed a bill against the husband for an account, and afterwards the same part owner and the rest of the owners filed a bill, the pendency of the first suit was held a good plea to the last; for though the first bill was insufficient for want of parties, yet by the second bill the defendant was doubly vexed for the same cause."

This authority seems to be directly in point; for a single corporator would not stand in any other position in reference to his company than a partner towards his co-partners, as to the right to institute a suit to maintain the common interests.

II.

But the main point in the present case, and that on which the judgment of this Court is especially desired, has reference to the exclusive rights claimed by the Memphis Gas-light Company, under its charter. The company asserts a right

to the complete monopoly of making and selling gas in Memphis. This extraordinary claim is based upon the language of the 3d section of the act to authorize the establishment of the Nashville Gas-light Company, which is adopted in the act establishing the Memphis Gas-light Company. It is found on page 12 of the record, and is in the following words:

"SEC. 3. It shall be the duty of said company to establish within three years from the 1st day of January, 1850, a gas manufactory within the city of Nashville, of sufficient capacity to supply its corporate authorities and inhabitants with such public and private gas-light as may be required."

The argument is, in brief, that the rights of the company are co-extensive with their obligations—that since they must establish works sufficient to supply the corporate authorities and inhabitants with gas, therefore the gas of that company alone can be taken, and the legislature has no power to create another company, and confer on it the privilege of making and selling gas in Memphis. If this argument were valid, it would equally imply that the inhabitants of the city might not manufacture their own gas, and that one citizen might not supply his neighbors if they chose to purchase from him.

That these extravagant claims are wholly unfounded in law is too well established by the courts of England and America to admit of dispute at this day, or to require any elaborate argument before this tribunal, which has so repeatedly had similar questions before it.

In one of the latest cases decided by this Court, the following rule is laid down:

"In the case of the Charles River Bridge, the rules of construction known to the English common law were adopted and applied in the interpretation of legislative grants, and the principle was recognized that charters are to be construed most favorably to the State, and that in grants by the public nothing passes by implication. This Court has repeatedly since reasserted the same doctrine; and the decisions in the several States are nearly all the same way. This principle is this: that all rights which are asserted against the State must be clearly defined, and not raised by inference or pre-

sumption; and if the charter is silent about a power, it does not exist."

The Binghamton Bridge, 3 Wallace, 75.

It is scarcely necessary to cite the following list of cases in which the question, in some of its forms, has been considered by this Court:

Beatty *vs.* Lessee of Knowles, 4 Peters, 152.
The Providence Bank *vs.* Billings, 4 Pet., 514.
Charles River Bridge *vs.* Warren Bridge, 11 Pet., 420.
Mills *vs.* St. Clair County, 8 How., 581.
Bridge Proprietors *vs.* Hoboken County, 1 Wallace, 116.
Turnpike Company *vs.* the State, 3 Wallace, 211.

Many other cases to the same effect might be cited, but it is believed to be wholly unnecessary. The refusal of Chancellor Smith to recognize the exclusive rights claimed by the old company is a respectable authority in itself; but it is made conclusive by the array of decisions already quoted.

The constitution of Tennessee, in the declaration of rights, sec. 22, declares "that perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."

In the case of McRee *vs.* the Wilmington and Raleigh R. R. Co., 2 Jones' Law, 186, the effect of a similar provision in the constitution of North Carolina is discussed. Certainly, such a clause in the supreme law of a State must at least be held as sustaining and enforcing the principle universally established by the courts, that such monopolies, if granted at all, must be granted in express terms, and cannot be derived by inference or implication from doubtful words.

It is to be observed that there is no question arising upon the contract between the Memphis Gas-light Company and the corporate authorities of the city. No exclusive privilege was secured by that contract, except as to the public lamps of the city, and there is no pretence of any intended interference with that provision of the contract.

III.

Although a replication was filed, the record states that by agreement of all parties the cause was set for hearing on the bill, answer, and exhibits. This is equivalent to a withdrawal of the replication, and the answer must be taken as true. In 1 Morris, 287, it is held that setting a cause for hearing on bill and answer is equivalent to a demurrer at law. 2 Daniels' Ch. Pl. & Pr., 1168, Perkins' edition. Now, the answer explicitly denies that allegation of the bill in which it is claimed that the Memphis Gas-light Company has complied with the requirements of its charter, and has furnished the means of fully lighting the city. (Record, pp. 32 and 34.)

The statement of the answer in this particular, especially as to the extortion and want of accommodation by the old company, commends itself to our belief; for it is self-evident that the new company would not have embarked its capital in such an enterprise, in the face of an established company with extensive means and facilities already in successful operation, unless excessive charges and corresponding profits had been made, or unless a considerable part of the field for the supply of gas had been unoccupied. In either case the organization of the new company was fully justified—I mean morally justified, without regard to the legal justification already established.

IV.

The bill of complaint (Record, p. 6) seems to rely upon the peculiarity of the charter of the Gayoso Gas Company, the same having been inserted as a section in "the act to incorporate the Edgefield Gas-light Company," passed May 23, 1866. (Record, pp. 16, 17.) There is nothing in this objection. The essential thing is that the company is incorporated and made an artificial person, its designation as the *Memphis* Gayoso Gas Company indicating the locality where its powers were to be exercised. Besides, the supplemental act (p. 17) passed December 4, 1866, was passed by the legislature, as

the answer alleges, with full knowledge of the organization of the new company, and that it claimed to exercise its privileges within the city of Memphis and in competition with the old company. All this is plainly to be inferred from the law authorizing an increase of the capital stock of the new company to one million of dollars.

But inasmuch as the first company has no exclusive privileges, and cannot claim a monopoly of the right to furnish gas to the citizens of Memphis, it can have no standing in a court of equity, when it asks to enjoin others from manufacturing gas and selling it to the citizens, whether those who initiate the new enterprise be natural or artificial persons. The rights of an incorporated company cannot be tried in this way.

V.

Finally, the answer (which, as already stated, must be admitted to be true to the full extent of its defensive allegations) denies the whole equity of the complainant's case. The questions of law must be determined by the enactments of the State and the adjudications of the courts. But all matters of fact must be taken as they are admitted or denied or defensively asserted by the answer. This alleges that the old company stood by and silently acquiesced in the proceedings of the new company, until the latter had expended large sums of money in prosecuting their works, and it was not until they had gone so far that to stop them would be ruinous, that the old company had applied to the courts for an injunction. By a very familiar principle of law, the old company, under these circumstances, would be estopped from setting up their exclusive rights, even if they had any.

FRED. P. STANTON,
For Plaintiff in Error.

DECEMBER 12, 1868.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

BRIEF.

THE MAYOR AND ALDERMEN OF THE CITY OF MEMPHIS,
THE MEMPHIS GAYOSO GAS LIGHT COMPANY, and
THE MEMPHIS GAS LIGHT CO., } *Appellants.*

VERSUS

THOMPSON DEAN, *Appellee.*

HUMES & POSTON, *Attorneys for Appellee.*

MEMPHIS, TENN.:
PRINTED BY THE SOUTHWESTERN PUBLISHING COMPANY.
1869.

Supreme Court of the United States.

The Mayor and Aldermen of the City of Memphis, the Memphis Gayoso Gas Light Company, and the Memphis Gas Light Company, *Appellants*
vs.
Thompson Dean, *Appellee.*

Brief.

The first question arising in this case, is upon a plea to the jurisdiction. The bill was filed by Thompson Dean, alleging himself to be a citizen of the State of New York, and against the Board of Mayor and Aldermen of the city of Memphis, Tennessee, and also against the Memphis Gayoso Gas Company, and the Memphis Gas Light Company, corporations chartered by acts of the General Assembly of Tennessee. He alleges that he is the owner of a large number of shares in the Memphis Gas Light Company; that this Company was chartered in 1849 and 1851 to erect a gas manufactory in Memphis, and to manufacture and vend gas to the inhabitants and corporate authorities of said city; that said Company did organize, and had been, and was still exercising its privileges and discharging its duties of supplying the inhabitants of Memphis with such gas lights as they required; that on the 18th of March, 1852, as required and permitted by the charter, the Memphis Gas Light Company entered into a contract with the Mayor and Aldermen of Memphis, by which the Company acquired the exclusive privilege, for twenty years and thereafter, until notified to the contrary, of lighting the public lamps, and also the right to lay down its pipes, etc., through all the streets, lanes and alleys of the city. He then alleged the subsequent incorporation of the Memphis Gayoso Gas Company, with all the rights, powers and privileges conferred upon the Edgfield Gas Company, which was authorized to erect gas works on the north side of Cumberland, in Davidson county. He further alleges that the Memphis Gayoso Gas Company had organized under its charter, and established an office in Memphis, and

claimed the right to construct public works for the manufacture and vending of gas in Memphis, and was engaged in laying down its pipes in the streets, lanes and alleys of Memphis, at many points laying them across the pipes of the Memphis Gas Light Company, and was digging and displacing the soil in and about, both above and below the pipes, conductors and other apparatus of the said Memphis Gas Light Company; that the Board of Mayor and Aldermen of Memphis, at a meeting on the 17th of September, 1867, passed an ordinance authorizing the Mayor to test the sense of the qualified voters of Memphis, as to whether the city should subscribe $250,000 to the Memphis Gayoso Gas Company. He then avers an apprehension that they will subscribe the above sum, and thus consummate a great wrong to complainant, to the injury of the franchise of the Memphis Gas Light Company. He denies the right of the Memphis Gayoso Gas Company to do the acts complained of, nor has the Board of Mayor and Aldermen the right to subscribe, etc., as alleged, as it would be in fraud of their contract to assist in establishing a competing company. He further alleges that the charter of the Memphis Gas Light Company is a contract granting to said Company the exclusive privilege of supplying the corporate authorities and inhabitants with such gas lights as might be required; and that by the charter, and the contract with the Memphis city authorities, the Memphis Gas Light Company acquired a right and easement in the streets, lanes and alleys of the city, also exclusive, neither of which could be revoked or impaired by any subsequent legislative act, and the charter of the Memphis Gayoso Gas Light Company is such violation; and the attempt of the latter to lay down their pipes in said streets, etc., was a violation of their rights aforesaid, and result in irreparable injury to complainant's Company; that he has applied to the President and Directors of the Memphis Gas Light Company, and urged upon them to proceed in the courts against the corporate authorities of Memphis and the new Company, which they decline to do, alleging that they have obtained a partial injunction against the new Company in the State courts, and they decline to proceed further. (See transcript, pages 1, 2, 3, 4, 5 and 6).

The plea to the jurisdiction states three grounds: 1st. "That "although the complainant is a non-resident stockholder of "Tennessee, yet his Company is a resident corporation of Ten- "nessee." This is no valid objection if case stated for relief

shows that the President and Directors of the old Company were guilty of a breach of duty in neglecting to assert properly the rights of the Company, so as to permit their value to be injured or destroyed—

Dodge vs. Woolsey, 18 How., R. 344–5.

The second ground stated in the plea is, that the President and Directors of the old Company have not refused to take all necessary and proper steps to protect the rights of complainant; and the old Company, on the contrary, had filed a bill in the Chancery Court of Memphis, seeking the same relief and urging the same matters of complaint as in this bill, and defendants exhibit a copy of that record. But it will be seen that, to that bill, the Mayor and Aldermen were not parties, and none of the allegations against them, of fraudulent and powerful combination with the new Company, in violation of their contract with the old Company and of its charter, are set forth. If the claims of the old Company are legally valid to the exclusive privileges as alleged by them, both under *their charter* and under *their contract of* 1852 *with the corporate authorities of Memphis*, then the alleged action of the Board of Mayor and Aldermen, in seeking to lend its aid to the new Company by subscribing $250,000 of stock, was a gross and dangerous fraud against the old Company and its stockholders. The President and Directors of the old Company, showing clearly that they knew and appreciated the rights of their Company, and the injuries sought to be inflicted on their chartered privileges, were guilty of the non-performance of a confessed official obligation in refusing to take steps against the Board of Mayor and Aldermen, which amounted, in the language of Judge Wayne delivering the opinion of this Court in the case of Dodge and Woolsey, 18 How., 345, *to* a breach of trust. Therefore, one of the stockholders was forced, in self-defense, to sue and call upon the Circuit Court of the United States, as a Court of Chancery, to stop this gross fraud of the city, *by whose powerful aid alone*, in all probability, the attack by adventurers upon its chartered privileges could be made successful—

Dodge vs. Woolsey, 18 Howard, 345.

The plea was overruled, properly, because it is defective. It is double, informal and multifarious, since it contains more defenses than one. It avers, first, as one ground of defense, that, although the complainant is a non-resident of Tennessee, yet the old Company is not. In the second and third grounds of the plea there

is alleged the pendency of another suit. A plea containing more defenses than one is bad. Various facts can never be pleaded in one plea, unless they are all conducive to one point, on which the defendant must rest his defense, otherwise it will be open to the charge of duplicity and multifariousness—

Story's Equity, Pl. Sec. 653–4, et seq.
The State of Rhode Island vs. Massachusetts, 12 Peters, 259.
2 Daniel, Ch. Pr., 102, 104.
Goodrich vs. Pendleton, 3 John Ch. R., 427.

The plea should have been overruled, because there is accompanying it no certificate of counsel, that in his opinion it is well founded in point of law, as required by the thirty-first rule of the Rules of Practice for the Courts of Equity of the United States, adopted by this Court in 1842. (See Conklin's Treatise, p. 761.) This plea is bad also, because it violates the latter clause of the thirty-second of the above rules, in this, that the bill specially charges fraud and combination against defendants, and the plea under this rule must be accompanied by an answer fortifying the plea, and denying the fraud and combination; this is not so accompanied.

The final decree declares the cause was heard upon "bill and exhibits," "answer and exhibits." It does not mention the replication by any other name than as an exhibit. But the replication had been filed duly before the hearing, and appears in the transcript of the record conforming to the sixty-sixth rule of equity practice of the Courts of the United States—

Conklin's Treatise, p. 769.

In the sense of pleading, "*to exhibit*" means "*to file of record*," and an exhibit means a record filed—

1 Bouvier's Law Dic., p. 500.

So a replication filed is an exhibit.

The various allegations of the answer, therefore, alleging failures on the part of the Memphis Gas Light Company to discharge the public duties devolving upon said Company under its charter are not proved, and cannot be considered, but even if proved they could and would be of no avail in proceedings of this sort, and upon a bill framed for the purpose of this bill. They could only be made available in favor of an individual or corporate authority suing the Company for damages sustained by reason of their non-compliance with their duty, or in a suit by such person to enforce

compliance with such public duty, or in a proceeding on the part of the State to enforce a forfeiture of the charter for violation thereof.

We insist, that by the express terms and words of the charter of the Memphis Gas Light Company, an exclusive privilege of erecting, establishing and constructing public gas works at Memphis, and of manufacturing and vending gas, by means of such public works, to the inhabitants and corporate authorities of Memphis, was granted to the Memphis Gas Light Company for the duration of its charter; that this grant is a contract, the subsequent grant of the same franchise to the Memphis Gayoso Gas Company, by the Legislature of Tennessee, impairs its obligation, within the prohibition of the Constitution of the United States, and, hence, this subsequent grant is void.

This privilege of establishing, erecting and constructing gas works and manufacturing and vending gas, *by means of public works*, to the inhabitants and corporate authorities of Memphis is a franchise, that is to say "a privilege or immunity of a public "nature, which cannot be legally exercised without legislative "grant." This Court, in the case of the Bank of Augusta vs. Earle, 13 Peters R., 595, said: "Franchises are special privileges "conferred by Government upon individuals, and which do not "belong to the citizens of the country generally, of common "right"—

Angel and Ames on Cor., Sec. 4 and 737.
Bank of Augusta vs. Earle, 13 Pet., 595.

No person or corporation would have the privilege, *of common right*, to erect and establish public gas works and lay down their pipes, conductors and other appartus through all the streets, lanes and alleys of the city, and manufacture and vend gas by

such public works to the inhabitants and corporate authorities of Memphis. Such privilege could only be exercised by virtue of a grant from the Legislature to an individual or corporation. This privilege is so far similar in its nature to the privilege of establishing and keeping a public road, a public bridge, a public ferry, fair, or market.

The franchise of the Memphis Gas Light Company has another feature, distinguishing it from the ordinary privileges of other private corporations. By the express terms of the charter it involves public duties and charges. Whatever gas lights any inhabitant of the city or the corporate authorities of the city may require, this Company is expressly bound by its charter to supply, and that, too, at a reasonable price, to be regulated by the price of gas in other Southwestern cities, and never to exceed one cent per cubic foot for gas. Such is the duty of this Company by the express provisions of the charter, and such is the *jus publicum*—

See Charter, sections 2, 3, 4, 5 and 7.
Charles River Bridge vs. Warren Bridge, 11 Pet. 630–1.
2 Dane's Abridg., Ch. 67, p. 683.
Charles River Bridge vs. Warren Bridge, 7 Pick. R., 496.

Now, this being a franchise, burdened with these public duties and charges, the owners must, as a reasonable equivalent, be protected in their property, their franchise.

We do not ask that an exclusive privilege shall be presumed or raised by implication. We ask that the extent and boundaries of our franchise be ascertained from the words of the grant, and that it be protected to that extent. We ask no more for it than would be asked in case of the grant of a tract of land. The extent and boundaries of our franchise are clearly defined and established by the terms and words of the charter, and the Legislature

could not subsequently grant to another company the whole or any part of our franchise. The same principle applies to the grant of a franchise as to the grant of a tract of land. The Legislature could not grant a tract of land for which an operative grant had been previously made; and so, too, a franchise, like that of the Memphis Gas Light Company, is likewise above the power of the Legislature, to be destroyed or impaired by a second grant. Such a franchise granted is a substantive right in law, and can no more be resumed by the Legislature, when once granted, than any other right.

This is the doctrine of the Charles River Bridge case. Chief Justice Taney delivering the opinion of the Court in that case, on page 546 says: "Nothing passes, in grants by the public, by implication from the nature of the grant, independent of the words." At page 548 he says, "adopting the rule of construction above stated as the settled one, we proceed to apply it to the Charter of 1785, to the proprietors of the Charles River Bridge. This act is in the usual form, and the privileges such as are usually given to a corporation of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge; and establishes certain rates of tolls. This is the whole grant. There is no exclusive privilege given them over the waters of Charles River above or below the bridge. *No right to erect another bridge themselves*, nor to prevent others from erecting one. No engagement from the State that another shall not be erected, and no undertaking not to sanction competition, nor to make improvements, that may diminish the amount of its income.

"Upon all these subjects the Charter is silent, and nothing is said about a line of travel. *No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff*

is entitled to them, it must be implied simply from the nature of the grant, and can not be inferred from the words by which the grant is made." The doctrine here laid down is, that, if the Charles River Bridge Charter had contained any one of the several clauses which the Chief Justice had consecutively stated as not contained in it, then the Court would have declared the privilege exclusive. Suppose, for instance, the Charter had provided that said Company shall have the privilege, and it shall be the duty of said Company to widen the avenues of its bridge, and build other bridges to meet the demands of the increased travel passing from Charlestown to Boston, can there be a moment's doubt that the Court would have inferred from the words of this grant an exclusive privilege over the waters of Charles River, between Boston and Charlestown, and an exclusive privilege in the line of travel from Boston to Charlestown? Would not such terms as clearly import such an exclusive privilege as if the Charter had provided in express words that the privilege given to them to build bridges over the waters of Charles River, between Boston and Charlestown, should be exclusive, and that their right to transport all travelers from Boston to Charlestown should be exclusive? The form of expression is nothing; it is the substance of their import or meaning which is to be looked to. The Chief Justice further, at page 549, says: "Notwithstanding the Charter and position of the Warren Bridge, all the franchises and rights of property enumerated in the Charles River Bridge Charter, and there mentioned to have been granted to it, remain unimpaired." Mr. Dutton, counsel of plaintiff in the Charles River Bridge case, at page 455, of 11 Peters, admits that the Charles River Bridge Company had no right under their Charter, and were under no legal obligation to widen the avenues of their bridge, or to build new bridges above and below the old one, to provide for the convenience and accommodation of an increased travel, but says they offered, by memorial to the Legislature, to do so. Mr. Davis, counsel for defendant in the same case, at page 504, after repeating "that the plaintiffs had offered to widen their avenues "and build new bridges to meet the public emergencies," adds: "They could not enlarge the bridge or the avenues, if insufficient "for the travel, without a grant of power from the Legislature. "Is this consistent with the claim of exclusive privilege over the "river? Is it true the plaintiffs hold this exclusive privilege, "and yet have no power to open a way suited to the public travel?

"Does not this limited power prove a limited franchise? Their "power to enlarge does not reach beyond the planks of their "bridge. And why? Because the Charter carries them no "further. By what rule, then, will it carry their franchise fur- "ther?" This argument, like clauses quoted from the opinion of the Court, contains an admission, that if the proprietors of the Charles River Bridge had, in express terms, been granted the privilege of, or it had, in express terms, been made their duty to widen the avenues of their bridge or build additional bridges to meet the demands of the increased travel from Boston to Charlestown, such privilege granted, or duty imposed, would have made their privilege exclusive, as claimed, to the line of travel between Boston and Charlestown, and to build bridges over the waters of Charles River, between Boston and Charlestown, to meet the demands of that line of travel.

Indeed, all the counsel and Judges in that celebrated case, both in the State Court and in the Supreme Court of the United States, assumed, as a settled principle of law, which could not be questioned, that to the extent of the franchise, as defined by the terms of the Charter, it was exclusive, and could not be revoked or impaired by any subsequent Legislature.

Charles River Bridge vs. Warren Bridge, Story's opinion, 11 Peters' R., p. 603.

This being the settled doctrine of this Court, I propose to show the limits of the franchise granted, and duties imposed by the Charter of the Memphis Gas Light Company.

The privileges granted are found in the second, fourth and fifth sections of the Charter. They are as follows: That the business of said Company shall be, and said Company shall have the privilege of erecting, establishing and constructing gas works, and manufacturing and vending gas in the city of Memphis, by

means of public works, for the term of ninety-nine years; and to enable the Company to establish such works, they are authorized to lay down pipes, and extend conductors and other apparatus through all or any of the streets, lanes, or alleys, of the city. These provisions are too express and plain to require construction. It is not the privilege to build one gas manufactory and in it to manufacture and from it to vend gas; but the "business" shall be, and the privilege shall be to erect, to establish, to construct gas works during the whole term of their charter; the privilege as to laying down pipes, conductors, and other apparatus, is not limited to one set or system of pipes, etc., but the permission is to lay them down during the term of the Charter in all the streets, lanes and alleys of the city. No one would contend that after the construction of the first manufactory of gas, if the city grew in population, until the first factory became incapable to supply the increased demand for gas of the inhabitants and corporate authorities, that the Company would not have the right to increase the capacity of the old factory or build new ones, and lay down new and additional systems of pipes, conductors and apparatus to meet the increased demand for gas. The capacity of the works could be increased, the size of the pipes enlarged, and new and additional systems of pipes laid down as the population of the city multiplied and created a greater demand for gas. This Charter contains the very terms and words which, had the Charter of the Charles River Bridge contained, would have made its privilege exclusive to the extent claimed by the proprietors in that case.

The third section makes it the duty of the Company to establish and construct a gas manufactory, of sufficient capacity, to supply the corporate authorities and inhabitants of the city with such public and private gas lights as may be required. Does this mean that it should only construct a factory of sufficient capacity to meet the demands of the inhabitants and corporate authorities as the city then stood, with a population of only eight thousand inhabitants, and that the Company would not be under obligation to increase the capacity of its factory so as to meet the demands of a population increased to seventy-five thousand. Such a construction would be totally inconsistent with the provisions of the second, fourth and fifth sections, and with that provident object which it is evident the Legislature had in view. This third section manifestly makes it the duty of the Company to erect,

establish and construct works of sufficient capacity to supply all the inhabitants and corporate authorities, and to enlarge the works as the demand for gas grew with the growth of the city. The fact that the Company is obliged to construct a factory of sufficient capacity to supply the corporate authorities and inhabitants with gas, raises a clear inference of a public duty to supply the authorities and inhabitants. If not in duty bound to supply, why the duty of constructing a work of sufficient capacity to supply?

The last clause of the fifth section requires the price to be charged to private consumers shall be reasonable, and shall be regulated by the prices of gas in other Southwestern cities, and, in no event, to exceed one cent per cubic foot. If the Legislature intended to reserve the privilege of chartering other gas companies to supply the demands of the city of Memphis, why not leave the price to be regulated by the ordinary law of supply and demand, and of competition? If a corporation to manufacture cotton fabrics, or tobacco, or any other article, had been created, no such provision to regulate the price would have been inserted, because the public would be protected by competition and the law of supply and demand. But in this case the Legislature, reflecting that they had created a corporation with the exclusive privilege of supplying gas to the inhabitants and corporate authorities of Memphis, and shut out competition, deemed it wise to protect the public of Memphis from the hazard of exorbitant prices, and therefore declared they should be reasonable, and regulated by the prices in other Southwestern cities.

The clause above quoted as to the price, furnishes to my mind an unanswerable argument, if any were needed, to show that under the terms of this charter, it would be a public duty of the Company to supply all the inhabitants and corporate authorities with such gas lights as they might require. If such is not their duty, how can the clause just quoted have any validity or force? If the Company could say to an individual or corporate authority, demanding to be supplied with gas, "we will not furnish you at all at less than one and a half, or two, or three cents per cubic foot in advance; it is true the charter requires our price to be reasonable, and to be regulated by the prices in other Southwestern cities, and in no event to exceed one cent per cubic foot, but then it is optionary with the Company to furnish you or not, and the Company have determined not to furnish gas to any unless

they will voluntarily pay more than the one per cent." Thus would be rendered nugatory this clause, so essential to protect the citizen.

In the fifth section the works of this Company are denominated "*public works*," thus showing that they are to be works from which the public are to be supplied as a right of the public, in contradistinction to "*private works*," to which the public would have no right to look or apply. As a public highway, a public ferry, a public bridge are distinguised from a private road, private ferry, or private bridge.

Hence I conclude that the charter of the Memphis Gas Light Company grants to it the privilege of furnishing to all the inhabitants and corporate authorities of Memphis, such public and private gas lights as they may require for ninety-nine years, and the charter also imposes the same as a duty upon the Company. The franchise and the duty are coextensive, and embrace all such public and private gas lights as may be required by the inhabitants and public authorities. The franchise embraces all the inhabitants and corporate authorities, and the duty imposed embraces all the inhabitants and corporate authorities; then, this is the extent of the franchise, and this identical franchise cannot be granted to another. The charter of the Memphis Gayoso Gas Company is such a grant, and is therefore void—

Chas. R. B. vs. Warren B., 11 Peter's, 603, 645.
Shephard vs. Gas Light Co., 6 Wisconsin R., 539.

Again, the duty imposed upon the Memphis Gas Company is to supply all the inhabitants and corporate authorities with gas lights; and to enable it to discharge this duty, it has granted to it the privilege of laying down pipes and extending its conductors and other apparatus through all or any of the streets, lanes and alleys of the city. The exercise of the same privilege

by a rival company would impair, obstruct and destroy the privilege of the old Company, and render it impossible to discharge its duty. This right to lay down the pipes, conductors and other apparatus in all the streets, lanes and alleys of the city is an easement, which, by the terms of the Charter, extends to all the streets, lanes and alleys, to every part of those streets, lanes and alleys, and, in point of time, embraces the entire term of the Charter. It is a right, too, not only to occupy the streets, lanes and alleys with the pipes and system of pipes first laid down, when the city was in its infancy, but to lay other and larger pipes, and additional systems of pipes, as the growth of the city might demand, until the entire streets might be occupied. To demonstrate that a similar right granted to another company would impair this grant to the Memphis Gas Light Company, it is only necessary to understand how these pipes must be laid.

The pipes are laid down so as to occupy an inclined plane, and cannot be laid otherwise. This necessity arises from two causes: first, the gas, being lighter than common air, its tendency is to rise, and hence the difficulty and great pressure required to force it through pipes descending from the reservoir. Secondly, the gas, in its passage from the works or reservoir, carries with it a quantity of vapor of water; this vapor, in its passage through the pipes underground, is condensed, and if no provision were made, the water would eventually obstruct the pipes and stop the passage of the gas; therefore drip-boxes or water-receivers are placed at certain intervals to collect the liquor caused by condensation. Of necessity the pipes must all incline into these drip-boxes to enable the water to drain into them. Thus the network of pipes is placed in a plane inclining to the drip-boxes and the reservoirs. Hence the absolute necessity that the Company should have the exclusive use and occupation of the streets.

The subtle character of gas renders it extremely difficult to convey it through pipes without serious loss from leakage, and requires that the pipes should be laid on solid earth and remain perfectly undisturbed.

Hughes' Gas Works, p. 237.

The easement, therefore, of the Memphis Gas Light Company in the streets, lanes and alleys of the city would be impaired by yielding to another company the same easement, and the Charter of the latter must impair and destroy the obligation of the former Charter and contract.

1 Washburn on Realty, p. 437.